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NOTES.

The Indian Traders Question in South Africa.

RECENT events in the Transvaal have thrown into the shade a controversy as to the treatment of Her Majesty's Indian subjects residing in the South African Republic, which, after pending several years, was referred to the arbitration of Chief Justice De Villiers of the Orange Free State. The documents and award are published as a Parliamentary paper (1895, C. 7911), and deserve the attention of students of international law, as one or two rather novel and curious points are involved. About ten years ago the legislature of the Transvaal passed a law restricting the settlement and trading of Asiatics in various ways. The British Government objected to this as being an infraction of Article XIV of the Convention of London of 1884, which purports to secure the rights of 'all persons, other than natives, conforming themselves to the laws of the South African Republic.' Certain modifications were then made in the law, to which Her Majesty's Government assented. The arbitrator found, on the construction of the correspondence which had passed, that this assent was unqualified. Thereupon he held that, first, it was no longer open to Great Britain to argue that the law in question was in derogation of the Convention; and, secondly, the law so assented to was an ordinary municipal law of the South African Republic, and as such must be interpreted by the competent tribunals of the country, and alleged errors in law on the part of those tribunals could not be properly made a subject of complaint by resident aliens to the Government of their own country. Now it is conceivable that proceedings against residents in a foreign State in time of peace, purporting on the face of them to be the regular interpretation of that State's municipal law by its ordinary competent tribunals, might be so manifestly perverse as to be evidence of a policy of systematic oppression or hostility, and to warrant the Power or Powers of which the persons affected were subjects in treating the proceedings as a whole as what in the

language of diplomacy are called unfriendly acts. In this case the argument on behalf of Her Majesty's Government was not put so high as that, and the arbitrator's decision seems, on the materials before him, to have been quite correct.

On the other hand the Government of the South African Republic contended that the 'persons' within the protection of Art. XIV of the London Convention included only Europeans and their descendants, and that the British Government had therefore no *locus standi* to object to any restrictive legislation whatever as to the settlement or trading of Asiatics in the Transvaal. The arbitrator, while inclining to think that in fact the case of Indians and other Asiatic settlers was not present to the minds of the contracting parties at the date of the Convention, held that Her Majesty's Government was entitled to rely on the natural and literal meaning of its terms, and decided against the contention of the South African Republic. In this he seems to have been equally right.

F. P.

The main subjects discussed at the conference of the International Law Association, held at Brussels in October last, were (1) Rules for Treaty of International Arbitration; (2) Territorial Waters; (3) Conflict of law as to the rule of damages which should be adopted in collisions at sea caused by joint fault of both vessels; (4) Execution of foreign judgments.

With respect to (1), rules were adopted providing for (α) definition of the class of differences to be settled, (β) the constitution of the tribunal, (γ) where the place of meeting should be, (δ) the decision to be given by the vote of the majority, (ϵ) the appointment of agents for both parties, (ζ) the treaty to provide for settling of doubts as to the limits of the arbitrators' jurisdiction, (η) the mode of procedure, (θ) the production of documents, (ι) the inadmissibility of domestic documents, (κ) the admissibility of written depositions, (λ) the cross-examination of witnesses, (μ) the expunging of irrelevant evidence, and (ν) the delivery of the decision. The President, Sir R. Webster, pointed out that the justification for standing rules for arbitrations was the fact that the number of cases referred to arbitration in a period of sixty years previous to 1873, when the Association was founded, was forty, whereas in the last twenty-three years it amounted to seventy.

As regards (2), Mr. Barclay of Paris presented the report of a committee on the subject, proposing articles mainly the same as those already adopted by the Institute of International Law. The main provisions were as follows:—States have the right of sovereignty over territorial waters; territorial waters extend to six miles from

low-water mark, while in bays the limit was to be reckoned from a line drawn across the bay at the nearest place to its opening towards the sea where the distance between the opposite shores does not exceed ten miles; straits are territorial waters if not exceeding twelve miles in width, and may exceed that width if their entrances do not exceed it; ships of all nations, except men-of-war, are to have the right of passage over territorial waters except in case of war, when it can be closed for purposes of defence, with the exception of straits which join one open sea to another, which are always open; all ships in territorial waters not merely passing through are subject to the territorial jurisdiction, civil as well as criminal.

As regards (3), M. Franck of Antwerp and Dr. Raikes, Q.C., read exhaustive papers illustrating and criticizing the present conflict of law on the subject, and a resolution was carried declaring that the French and Belgian rule of apportioning the damages in proportion to the gravity of the fault committed by either ship was preferable to the German rule by which each ship bears its own loss, and the English rule by which each pays half the other's damages.

On the fourth subject, M. Brunard of Brussels and M. Lachau of Paris read papers, the former giving the Belgian law on the subject and proposing that members of the Association who were also members of legislative bodies should endeavour to introduce into the laws of their countries the text of the proposals adopted by the Association at Milan in 1883, the latter advocating treaties between different States as steps towards international unity on the subject. Mr. G. G. Phillimore read a paper stating the English law and practice. A committee was appointed to collect the provisions of the various legislations dealing with the question.

When the framers of the Winding Up Act, 1890, brought that heavy piece of ordnance—the public examination—into the field, they confidently expected it to spread a panic in the ranks of fraudulent directors and promoters, and so it undoubtedly did. However, after failing to go off when wanted, it has now been effectually spiked by the House of Lords (*ex parte Barnes*, '96, A. C. 146, 65 L. J., Ch. 394), that is, for all purposes of use in legal warfare or winding up administration. The conditions are as impracticable as those prescribed by the fair Portia to Shylock for carving up Antonio. First, say the law lords, you—the Official Receiver—must find fraud, not at large, but against the particular examinee; and even when you have done that it will not entitle you

to summon any other of the directors, promoters, or depositaries of information. Naturally the Official Receiver exclaims, 'How am I to find fraud before I have elicited the facts, and if I do find fraud a fraudulent examinee is the last person from whom I am likely to get the truth?' But his sighs the gods dispersed into thin air, for the Olympian wisdom of the law lords concerns itself but to declare the law to mortals.

In truth, however, not many persons will grieve if the section is rendered unworkable. It was an ill-advised piece of legislation, founded on the false analogy of bankruptcy, and unfair to directors. The machinery of section 115 supplies, or with a little tinkering will supply, all that is really needed to secure the fullest investigation.

Hardaker v. *Idle District Council*, '96, 1 Q. B. 335, 65 L. J., Q. B. 363 (C. A.), brings clearly into light a distinction which in practice it is not always very easy to follow, between the liability of a body such as a District Council for damage caused by the Council to a third person by the omission of the Council to perform some duty imposed upon it by law, and the liability of such a body for damage caused to a third person by the negligence of the servants of the contractor who is employed by the Council.

The law on this point may, it is conceived, be thus stated:

1. If a Council, or indeed any other body, is under a legal duty to the public, e.g. to keep up gas works, or to erect a bridge over which the public may pass safely, and the persons employed by the Council construct gas works from which the gas escapes, or build a bridge over which the public cannot pass safely, then if any person is damaged thereby the Council is responsible for the injury; the Council is liable not because of the negligence of the persons who have done the work, but because the Council has not performed the duty imposed upon it by law (*Hole* v. *Sittingbourne Ry. Co.*, 6 H. & N. 488; *Gray* v. *Pullen*, 5 B. & S. 970).

2. If a Council, or indeed any other body, employs a contractor to carry out work, e.g. to erect gas works, which the Council is under a legal duty to carry out, and in the course of this work damage is caused to a third person by the incidental negligence of one of the contractor's servants, e.g. by his letting a stone fall on a passer-by, the Council is not liable for the damage (*Reedie* v. *L. & N. W. Ry. Co.*, 4 Ex. 244).

The distinction may thus be summed up: A public body which employs a contractor to do work, e.g. erect a bridge, which the public body is bound to perform, is liable to third parties for damage caused from the work not being done, or, what is the same

thing, from its being badly done. A public body, on the other hand, which employs a contractor is not the employer of the contractor's servants, and is not (as an employer would be) liable for damage caused to third parties by the negligence of the contractor's servants in performing their work.

But, as remarked by Lindley L.J., it is not always easy to avoid mistakes in applying this or indeed any other principle to difficult cases. In other words, the distinction, though a real, is a fine one.

Lyons v. *Wilkins*, '96, 1 Ch. 811, decides in effect that it is unlawful for men on strike, or the officers of their trade union, to 'picket' the employer's place of business even with two or three men, unless those men strictly confine themselves to informing persons who come there to offer their services to the employer, or to make inquiry, that there is a strike, and (we suppose, but we are not quite sure that the decision allows even this) what the matters in dispute are. If they use any kind of persuasion against working for that employer, even by the most peaceable argument and without threats of any kind, they are deemed to be watching or besetting the place 'with a view to compel' the employer, or the workmen who might be minded to serve him, or both, to abstain from doing or to do what they have a legal right to do or abstain from doing. So the Court of Appeal reads the Conspiracy and Protection of Property Act, 1875, s. 7, and it is emphatically so laid down, in particular, by Kay L.J. at p. 830. If such be the law, we are pretty sure it is not the law Parliament intended to make; and after carefully reading the judgments two or three times we are unable to see why persuasion cannot be distinguished both in fact and in law from compulsion. This and other recent cases of the same class ought certainly, in our opinion, to be reviewed by the House of Lords. We have great difficulty in reconciling some of the utterances of the Court of Appeal, especially the branch of it over which Lord Esher presides, with the principles laid down by that House in the *Mogul Steamship Co.'s* case, '92, A. C. 25.

In *Clutterbuck* v. *Taylor*, '96, 1 Q. B. 395, 65 L. J., Q. B. 314 (C. A.), the majority of the Court of Appeal decided that a policeman who has the exclusive occupation of a cubicle in a dormitory at a police station does not thereby so occupy a part of a house as to be entitled to a vote at a Parliamentary election under the Representation of the People Act, 1884, s. 3. The decision depends on the exact terms of the Act and the peculiar circumstances of the

particular case, but it suggests a conclusion and a question of considerable general importance.

The conclusion is that a very slight change in the phraseology of the Acts conferring the Parliamentary franchise, or even apparently a slight change in the arrangements as to the quartering of policemen and soldiers, might confer a vote upon every policeman and upon every soldier stationed, at any rate for a length of time, in the United Kingdom.

The question is whether it is really desirable that soldiers and policemen should have votes. In several countries soldiers are, as such, excluded from the exercise of the franchise. In England they are not as such excluded, but a soldier in the ranks has, it is conceived, hitherto but rarely been able to fulfil the conditions required of a voter. The mass of the army, therefore, have not in practice been electors.

The exclusion, whether it be directly enacted or indirectly brought about, of policemen and soldiers from the body of electors is clearly expedient. The first duty of such officials is obedience to commands; the first duty of an elector is the expression of his independent judgment. The moral and mental attitude of a soldier is, and ought to be, quite different from that of a voter. But in arguing this matter we need not rely on grounds of principle. The practical effect of giving votes to the mass of the army would be to increase, and that in the most undesirable way, the power of any party which held office. A thousand, five hundred, or even a hundred votes are often sufficient to turn an election. If as a rule ordinary soldiers had votes, elections would be turned by the stationing of regiments. It needs no arguments to show that such a state of things would impair at once the efficiency of the army and the independence of Parliament.

When Thackeray was at Brussels he would point out to a friend the hotel where Amelia and George and Dobbin stayed during the memorable Waterloo campaign. The persons and incidents of fiction—the world of imagination—have often, as we know, more reality for us than those of so-called real life. But dear as our friends of fiction are to us, we should still hesitate to describe them as 'individuals' though we had rather that than do them the indignity of describing them as a 'word or words . . . not being a geographical name.' The construction of the Trade Marks Act, 1883, however, is not a question of sentiment, nor is it the old controversy of Nominalists and Realists revived, and as a dry point of construction it is difficult to say that 'Trilby' is not a 'word' within s. 64 (1) (e) of the Act, especially as the subsection itself

by the geographical qualification shows that a 'word' may be a name (*In re Holt & Co.'s Trade Mark*, '96, 1 Ch. 711, 65 L. J., Ch. 410 (C. A.)). Looking at it apart from a microscopic examination of the clauses of the subsection, the policy of the Act is to give traders the greatest latitude of choice in the matter of trade marks which is consistent with respect for the rights of other traders and of the public. This is the liberty of English law, and there is this to be said for it in the case of trade marks, that the wider the field of choice the less excuse there is for infringement by similarity.

Tomlinson v. *Broadsmith*, '96, 1 Q. B. 386, 65 L. J., Q. B. 308 (C. A.), decides that the managing partner of a business firm has implied authority to employ a solicitor to defend an action against the firm for the price of goods supplied to the firm in the ordinary course of business, and, further, that the solicitor so employed has, though the action is brought against the firm in the firm's name, authority to enter an appearance in the names of each of the partners individually (Ord. XLVIII A. r. 5), and is not bound to keep the partners, other than the managing partner by whom he is employed, informed of the progress of the action.

All this is good sense as well as good law. What is remarkable is that there should exist so little reported authority as there appears to be directly supporting conclusions the soundness of which can hardly be disputed. A student should constantly bear in mind that a great deal of English law consists, to use the expressions of an eminent judge, of 'law taken for granted.'

Gaskell v. *Gosling*, '96, 1 Q. B. 669 (C. A.), repays and will receive careful study. The circumstances of the case are a little complicated, but the substantial question raised is whether, when trustees for debenture holders are under the deed of trust, empowered to appoint a receiver to carry on for the benefit of such holders the business of a company, the trustees are personally liable for debt incurred by the receiver, at any rate if incurred after the winding up of the company has begun. The Lord Chief Justice, the Master of the Rolls, and Lopes L.J. have held that the trustees are personally liable. From the judgment Rigby L.J. has dissented. To put the matter broadly, the Lord Chief Justice and the majority of the Court of Appeal have held that the trustees were undisclosed principals, and liable as such on contracts made by their agent, the receiver. Rigby L.J., on the other hand, holds that the receiver was not the agent of the trustees, and that from no point of view can they be held liable for his acts.

Dogmatism is evidently out of place when eminent judges disagree, and when their judgments, it may be presumed, will soon be reviewed by the House of Lords. It is, however, allowable to remark that the dissenting judgment of Lord Justice Rigby is most carefully considered and is entitled to great weight. The liabilities, no less than the rights, of an undisclosed principal are in the strictest sense anomalies. They are, we believe, unknown in countries where the English common law does not prevail, and it is more than doubtful whether, could the matter be considered apart from authority, these anomalous rights and liabilities would be approved by English judges. Under this state of things it seems doubtful whether the liability of an undisclosed principal, especially when acting as a trustee, should be further extended. When *A* trusts *B* without even knowing of the existence of *C*, it is hard to see why *A* should be allowed to make *C* responsible for *B*'s breach of contract, and *A*'s claim is not made the stronger by the fact that *C* is acting as trustee for *X*.

Andrews v. *Mockford*, '96, 1 Q. B. 373, 65 L. J. Q. B. 302, C. A., is a decision of great importance for the company-promoting world. It shows that *Peek* v. *Gurney*, L. R. 6 H. L. 377, did not lay down a rule of law that a prospectus is necessarily addressed only to original applicants for shares. That is the normal course of things; but it may be the fact that the prospectus is used by the promoters for the purpose of creating a market for the shares after allotment, and in particular this may well be found as a fact where the prospectus is reinforced, so to speak, by subsequent representations of the promoters. If such representations are fraudulent, they may be regarded as making up, together with the prospectus, one continuing fraud; and its utterers will be answerable to a person who bought shares in the market on the faith of the prospectus and of its pretended confirmation.

A loan company lends *A* £3,500 at interest. *A* is unable to pay either capital or interest, and after four years the company realizes the security, which produces £3,000. How is this to be dealt with? According to the principle laid down by the Court of Appeal in *In re Hubbuck* ('96, 1 Ch. 754, 65 L. J., Ch. 271) the company ought to treat it as a receipt on account of the arrears of interest as well as on account of the capital of the loan, and apportion it between capital and profits. This proposition would, we think, surprise the directors and auditors. They would be more likely to write off £500 as a loss on capital account, and say nothing about the interest.

In *In re Hubbuck* the question arose between tenant for life and remainderman. The testator directed that the actual income of his residuary estate should, pending conversion, be paid to the tenant for life, his intention being to exclude both branches of the rule in *Howe* v. *Earl of Dartmouth* (7 Ves. 137, 6 R. R. 96), which, however equitable in theory, is inconvenient in practice. But he reckoned without his host, for the Court of Appeal said in effect: 'True it is that no interest has ever been paid on the £3,500 loan, but there is a rule in this Court that where the testator has not expressed an intention to the contrary, losses on account of capital and income must be apportioned between tenant for life and remainderman. Consequently the £3,000 which has been received consists partly of capital and partly of income, and the part which represents income must be treated as actual income within the meaning of the will, and be paid to the tenant for life.' Is there not a flaw in this reasoning? When we say that by a rule of the Court a sum is treated as income, this is surely the same thing as saying that it is only fictitious or imaginary income. How can it be actual income? If the testator had had the precise point in his mind it is difficult to see how he could have provided for it in more appropriate language.

In re Newton, '96, 1 Ch. 740 (C. A.), cannot be said to add anything to the law on the religious education of children. English law has long ago recognized the father as supreme in this matter, capable of forfeiting though he cannot abdicate his paternal rights and responsibilities. It has as fully recognized the mischief of unsettling religious ideas, of which Gibbon is the stock example. But though embodying nothing novel in law *In re Newton* is a very instructive case as illustrating the working of the present system; and all the more from being—in a sense—typical. The father, that is, was an indifferent religionist—a professed Catholic, the mother a woman of fervent piety—a Wesleyan as it chanced: she might have been an Anglican or a Catholic or an Irvingite. This is the common relation of the parties—the father careless, the mother religious or at least more careful of religious observances. Inevitably in such a situation the children of the marriage come under the mother's influence and imbibe her faith. 'I am,' said Samuel Morley, 'what my mother made me,' and it has been so from the time of St. Augustine to William Cowper. Maternal love and tenderness mould the child's earliest ideas of religion, and when the father's scruples awaken it is too late. There is nothing to regret in this, but it points the irony of the situation. English law gives

the power and supremacy to the father. Nature gives it to the mother, and when these two come in competition we know which generally gets the best of it.

In holding the balance between trustee and cestuique trust the Court has, as Lord Eldon observes, to recollect the importance on the one hand of securing the property of the cestuique trust, and on the other hand of not deterring men from undertaking trusts, 'from the performance of which,' adds the great Chancellor, 'they seldom obtain either satisfaction or gratitude.' Seldom indeed! The impudence of the claim, for instance, in *Chillingworth* v. *Chambers* ('96, 1 Ch. 685, 65 L. J., Ch. 343 (C. A.)) is but thinly disguised under the veil of legal technicalities. It was a disingenuous attempt by a beneficiary trustee who had instigated a breach of trust to get indirectly under the name of contribution or indemnity what he could not get directly. Putting on the mask or persona of cestuique trust he says to the trustees, 'you are answerable to me for the breach of trust.' This is undeniable. Then dropping the cestuique trust character and assuming the mask of trustee, he says to his co-trustee, 'we are in *pari delicto* in this matter; you must contribute your share to the loss,' conveniently ignoring the fact that the trustee who claims contribution is the same individual who instigated the breach of trust. The unconscionableness of the cestuique trust, however, is an old story. The real point of the case is, that where a cestuique trust instigates a breach of trust the trustee is entitled to be recouped to the whole extent of the cestuique trust's interest, not merely to the extent to which he has benefitted by the breach of trust. If this were not so it would make the redress as often as not illusory.

Management is undoubtedly the weak point of co-operative enterprise. A director who takes his seat once or twice a month at a board meeting for an hour or two may be honestly desirous of doing his best for the company, but he cannot feel the consuming interest in the business which the ordinary trader feels whose livelihood depends on it. To the director the company is only one out of several irons which he has in the fire, and he can regard its fortunes with considerable equanimity. This *laissez-faire* disposition of directors would have received a fatal encouragement had the Court of Appeal held in *La Compagnie de Mayville* v. *Whitley* ('96, 1 Ch. 788 (C. A.)) that notice must be given to a director of the business to be transacted at a board meeting. The director's mental comment nine times out of ten would be, 'Oh! this business

is of no importance: they can get on without me.' So he stops away, with the result that important business turns up, and the company loses the benefit of the 'combined wisdom' of the board, perhaps falls into the hands of unscrupulous members of the board. Shareholders' meetings are quite different. Shareholders have a right to leave the company's affairs to the directors, and to assume that the directors are doing their duty. An appeal to them in the case of an extraordinary meeting is in the nature of a 'referendum,' and as such the particular issue ought to be placed clearly before them.

Caveat emptor is a just rule for the buyer of a chattel, because he can see and handle his purchase, but it ceases to be just where the subject-matter of the sale is such a thing as a share or a lease, because the buyer's means of knowledge are not the same as the seller's. Hence the obligation of *bona fides* to redress the balance. The vendor of a lease knows all about the covenants it contains. The purchaser does not, and therefore if the covenants are unusual and onerous it is, on the plainest principles, the duty of the vendor to bring them to the notice of the purchaser. The vendor in *White and Smith's Contract* ('96, 1 Ch. 637, 65 L. J., Ch. 481) did not dispute this but he confessed and avoided the obligation, that is, he said that he had discharged it—had given the purchaser constructive notice—by having his solicitor present at the auction with the lease ready for inspection. If there were, indeed, a recognized custom of this kind, the purchaser might be bound by it, but no such custom was proved nor could be, for it wants the essential condition of reasonableness. It would require an Indian fakir's power of abstraction to peruse and master the conditions and covenants of a lease amid the dust and din of an auction room.

No doubt the time will come when the restraint on anticipation will survive only as a curious relic of the subjection of women in a barbarous age, like the cucking-stool or the gossip's bridle; but at present it still has its uses, not only in preventing extravagant but irresistible Mr. Mantalinis from squandering their wives' fortunes, but also in saving married women from themselves—from their own extravagance. 'What they do,' said Chitty J., 'is, they involve themselves in difficulties and then make piteous affidavits' (*In re Pollard's Settlement*, '96, 1 Ch. 901, 65 L. J., Ch. 496) asking the Court to remove the bar under the power in the Conveyancing Act. The particular married woman who elicited this remark from the learned judge must be admitted to have been a disgrace 'even to her sex,' for not contented with twice getting help

from the Court, she had gone on to borrow £500 from a money-lender, and got her step-father, an old clergyman, to go surety: but in spite of 'piteous affidavits' and an execution at the rectory Chitty J. stood properly firm. The 'benefit of the married woman,' which is the foundation of the jurisdiction, is a phrase of large meaning, but henceforth married women will have to take notice that the Court does not regard it as being for their benefit to relieve them against the consequences of their own or their husband's extravagance.

The time is coming when the whole question of the authority to be given for what may be termed the promotion of morality to municipal bodies, will require careful consideration. This is at least suggested by *Burnett* v. *Berry*, '96, 1 Q. B. 641, 65 L. J., M. C. 118, and other recent decisions on the validity of by-laws. In that case a by-law, under the Municipal Corporations Act, 1882, s. 23, which prohibited under a penalty any person 'from frequenting and using any street or other public place within the borough for the purpose of book-making or betting,' has been held valid. Now there is no sensible man who at the present time of day can regret that betting should be discouraged; but there are hundreds of sensible men who look with distrust on the tendency to enforce morality by law, and who hold with assurance that if legal penalties are imposed in support of morality, they should be imposed by the nation, and not by bodies which may represent merely local sentiment or prejudice. The language of Lindley L.J. in *Strickland* v. *Hayes*, '96, 1 Q. B. 290, 65 L. J., M. C. 55, will, if taken in its natural sense, command the assent of persons who distrust encroachments by law on the field of morality, and it is with some regret that we see Lord Russell of Killowen and Wright J. dissent from Lord Justice Lindley's temperate wisdom.

Clegg & Co. v. *Earby Gas Co.*, '96, 1 Q. B. 592, 65 L. J., Q. B. 329, is a good instance of the way in which adherence to legal principle conduces to justice. The omission of the defendants to provide the plaintiffs with a sufficient supply of gas caused the plaintiffs undoubted damage. But the duty of the Earby Gas Co. to supply the plaintiffs with gas clearly did not arise from a contract. It followed therefore logically that, as laid down by the Queen's Bench Division, the plaintiffs, whatever other remedy they might possess, could not maintain an action for breach of contract. Some indignant layman will suggest that respect for logic has here caused practical injustice. The answer is given by Wills J. 'When

large numbers of persons are supplied with gas, the undertakers might speedily be ruined if any one could bring an action of this kind [i.e. for breach of contract] against them.' In other words, the dictates of logic coincide with the requirements of general expediency.

It is satisfactory to learn from *Liddell* v. *Lofthouse*, '96, 1 Q. B. 295, 65 L. J., M. C. 64, that the place where a man regularly takes and gives bets is 'a place' within 16 & 17 Vict. c. 119, s. 3; but there is a touch of absurdity in the thought that one learned judge after another should have perplexed his own mind, and gone near to render the laws against public betting ineffective, by the effort to define what is meant by 'a place.'

It is satisfactory to know, on the authority of *The Queen* v. *Riley*, '96, 1 Q. B. 309, 65 L. J., M. C. 74, that a cheat who obtains money by means of a telegram, the date of which was fraudulently misrepresented, can be indicted and convicted for the offence of obtaining money by means of a certain forged instrument, to wit a forged telegram; but the fact that two such judges as Lord Russell of Killowen and Vaughan Williams doubted whether the indictment was good, makes a reader feel that the effectiveness of the Criminal Law is much hampered by technicalities. There ought surely to be a broad and clear definition of forgery, which should include all offences substantially falling under that term. In the definition of criminal offences distinctions are out of place. No one can doubt that the prisoner Riley obtained money by a gross fraud and deserved punishment; it would have been a scandal if he had escaped the penalty due to his offence simply because the Forgery Act, 1861, s. 8, is obscurely drawn.

Last year the puzzle of *Reg.* v. *Ashwell* recurred in an Irish Court, and led to no less divergence of judicial opinion (*The Queen* v. *Hehir*, [1895] 2 I. R. 709). The master of a ship pays a labourer his wages in what he—the master—thinks two £1 notes and some silver. One of the notes is really a £10 note. The labourer takes it innocently, finds out the mistake soon afterwards, and makes up his mind to appropriate the note. By five to four the Irish Court held that this was not larceny at common law. The judgments were, perhaps, more carefully and elegantly written than in *Ashwell's* case: see especially that of Gibson J. The lines of argument were much the same: the majority held that the prisoner had lawful possession of the £10 note by a real though

mistaken delivery (in which case he clearly could not steal it at common law); the minority that he had no possession at all, but a bare custody, until he discovered the mistake, when he took the £10 note, in the legal sense, for the first time. Mr. Justice Wright's view, which is different from both of these, and upholds the conviction on the ground that there was no delivery in the first instance, but there was a trespassory though excusable acquisition of possession, capable of being made felonious by subsequent *animus furandi* (Pollock and Wright on Possession, p. 210), was referred to, but, we submit, not adequately considered. The choice lies, we think, between this and the theory of no possession at all. Either way the conviction is right.

Hanks v. *Bridgman*, '96, 1 Q. B. 253, 65 L. J., M. C. 41, and *Lowe* v. *Volp*, '96, 1 Q. B. 256, 65 L. J., M. C. 43, each uphold the validity of by-laws made by tramway companies with regard to the mode in which passengers must deal with their tickets. A passenger may be legally required by by-law either to deliver up his ticket or to pay the fare legally demandable for the distance travelled over, and a passenger may be fined who refuses to show his ticket to the inspector of a company. By-laws such as those upheld, though they may occasionally cause a little hardship to individuals, clearly ought to be enforced. It is hard that a traveller should be compelled to pay his fare a second time simply because he has lost his ticket, but it is clear that the precautions necessarily taken against fraud by tramway or railway companies would be rendered futile if passengers could at their will or caprice throw away their tickets or decline to show them.

One of the most marked features of English as contrasted with foreign institutions is our habit of entrusting to Courts the exercise of functions which in their nature are rather executive or administrative than judicial. Take for example *Cook* v. *White*, '96, 1 Q. B. 284, 65 L. J., M. C. 46, and *Hewitt* v. *Taylor*, '96, 1 Q. B. 287, 65 L. J., M. C. 68. These cases decide points which are not in themselves worth special notice on the construction of the Sale of Food and Drugs Act, 1875. They show, however, that the whole working of the laws against the adulteration of food is in England made dependent on the view taken by the Courts of complicated and often obscure enactments. We may be almost certain that in France or Germany the effect of similar laws would in reality depend upon the action of State officials charged with the enforcement of sanitary regulations. The objections which lie against increasing the authority of

the executive power are patent to Englishmen. Still it is a question whether now that the intervention of the State in all matters of public concern, such for example as sanitary questions, is constantly being increased, it is not a mistake to turn the Courts into administrative bodies. Judicial officers, such as magistrates, are thereby forced to occupy themselves with questions that are not really judicial, and the vigorous enforcement of administrative measures is impeded by the fact that the pettiest question of detail may give rise to legal proceedings.

Strickland v. *Hayes*, '96, 1 Q. B. 290, 65 L. J., M. C. 55, is a good example of the limits which the Courts place, and ought to place, on the legislative powers of local bodies. A County Council passed a by-law that no person should in any street or public place, or on land adjacent thereto, use profane or obscene language. The by-law has been treated as invalid, and this for two perfectly sound reasons. In the first place, the area to which the by-law extended was clearly too wide. In the second place, even if you omit the words 'or on land adjacent thereto,' still the by-law is unreasonable. It would as it stands make it penal for a person to swear or utter an indecent expression, even though he were alone and caused no annoyance to any one whatever. Lindley L.J. and Kay L.J. have clearly laid down that some words ought to be added importing that the acts forbidden must cause annoyance to others. It is one thing to forbid a man's annoying other people by the use of obscene or profane language, it is quite another thing to forbid obscenity or profanity. The distinction is elementary, but it is one which local bodies are likely to overlook and which should be forced upon their attention.

[A learned contributor sends these further remarks on *Culling* v. *Culling*, '96, P. 116, noted in our April number, p. 103, above. The novelty and curiosity of the point seem to justify recurrence to it.]

The decision that the old common law of marriage does, and the English Marriage Acts do not, apply to the solemnities of marriage on a British man-of-war on the high seas is probably right, but suggests a curious speculative inquiry. Is a British man-of-war to be considered 'English' territory or 'British' territory? Such a case as *Seagrove* v. *Parks*, '91, 1 Q. B. 551, implies that a man-of-war is part of England; but, if so, is it perfectly clear that the English Marriage Acts do not apply to a marriage on board a man-of-war, i. e. to a marriage celebrated in England? From some

points of view, however, it is difficult to maintain that a British man-of-war is 'English' rather than 'British' territory. But if we assume that a British man-of-war forms part, not of England, but of the United Kingdom, or possibly of the British Empire, then endless inquiries arise as to the law which in civil matters prevails on board ship. Is it the law of England exclusively or also the law of Scotland? Would a will be valid if made there in a Scottish form by a Scotsman domiciled in England? Has Lord Kingsdown's Act, 24 & 25 Vict. c. 114, any application to wills made on board ship; and if it has, how is it to be applied? Would the marriage between Mr. and Mrs. Culling, if contracted *per verba de praesenti*, or if the marriage ceremony had been gone through before a Presbyterian minister, have been valid? These and various other questions depend for their answer on determining whether the British Navy is or is not from a legal point of view a part of England, and this is a matter on which it may be suspected Scottish or Irish Courts might lean towards a different conclusion from that which would commend itself to English judges.

When we are met by a covenant in a lease against carrying on any 'noisy or offensive trade, business, or profession' on demised premises, we are inclined to construe 'noisy' as meant to protect the ear, 'offensive' the nose. This gives a kind of logical symmetry to the covenant. But this materialistic construction of the word 'offensive' in a covenant as meaning some ill-smelling trade, soap-boiling, or currying, whereat 'the nose is in great indignation,' will not do according to the view of the Court of Appeal in Ireland (*Pembroke* v. *Warren*, [1896] 1 I. R. 76). It is not to be restricted to what is unpleasant to eye, ear, or nose. It must be interpreted *secundum subjectam materiem*. Therefore a private hospital set up in a fashionable square in Dublin is 'offensive,' because 'it causes a well-founded and reasonable annoyance.' A private lunatic asylum has been held in English law not to be an 'offensive trade' (*Doe* d. *Wetherell* v. *Bird*, 2 A. & E. 161), but that was because it was not a trade, not because it was not offensive. This enlarged view of 'offensive' will seemingly require the law to dip into aesthetics if it is to keep in sympathy with the growing sensibilities of the race.

What, by the way, is the legal effect of the words 'not transferable,' invariably we believe to be found printed on a railway ticket? This is a point on which, from a public point of view, a legal decision is much to be desired. If the words mean anything, they

must, it would appear, mean that *A* can under no circumstances whatever legally assign his rights under a railway ticket to *B*; but if this be the effect of the words, then some odd results follow. *A* and *B* each take a ticket from Oxford to London. Owing to some confusion they exchange tickets. Assume that these facts can be proved, has the ticket collector the right to demand a second fare from each of them? Or take a more possible case: *A* and *B* each take return tickets from Oxford to London. *A* loses when in London the remaining half of his return ticket. *B* makes *A* a present of *B*'s half of *B*'s ticket and *A* returns with it to Oxford. Has the company in strictness a legal right to charge *A* on his return with the fare from Oxford to London on the ground that *B*'s ticket was not transferable to *A*? All these questions come round, it is conceived, to one inquiry. Does a railway ticket in any sense embody the contract between the railway company and the passengers, or is it at most only evidence of the contract having been completed? In America the better opinion seems to be that the ticket *is* the contract, and it has been maintained with great ingenuity that it is negotiable (Mr. Joseph H. Beale, junr., in Harv. Law Rev. i. 17).

We learn from an article on the Draft Civil Code of the German Empire by Herr Alexander Meyer, in the May number of *Cosmopolis*, that as late as 1845 there were five different rules of succession in force in the city of Breslau. But an article by Mr. Edmund H. Bennett in the American Law Register for April discloses an even more chaotic state of things still existing in the marriage laws of various parts of the United States. In several jurisdictions the age of consent has never been raised from the old limits of fourteen and twelve years for husband and wife respectively, and in more than one the effect of legislation as to the form of solemnizing marriage has been nullified by holding the statutes to be merely directory. We cannot afford to make merry over the 'Provinzialrechte' of the Continent while such anomalies are possible among English-speaking commonwealths.

Lord Russell of Killowen's eloquence on the matter of legal education has produced, so far, little or no visible result. We can hardly say we are disappointed, for we did not expect anything better. The Benchers have stopped their ears, and if they will not listen to a charmer who charms so wisely as the Lord Chief Justice, it is not likely that anything short of the great guns of a Royal Commission will stir them. Meanwhile the Boards of legal studies

in the Universities, finding that the Inns of Court persistently refuse to treat with them on an equal footing, have properly desisted for the present from their attempts to obtain something like an adequate recognition of the work of their schools in the Bar Examination scheme.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

FEUDAL SUZERAINS AND MODERN SUZERAINTY.

IT is proposed in the following pages to trace historically the connexion between the feudal and the modern ideas of suzerainty. No such investigation, it is believed, has been made. The article in Merlin's Répertoire deals with the purely French and feudal suzerain. That of Mr. C. Stubbs, in the *Law Magazine and Review* of 1882, applies feudal principles to modern suzerainty to a greater extent, as it seems to me, than the facts warrant. I shall consider: I. The origin and derivation of the word *suzerain* and the abstract form *suzerainty*; II. Its earlier history; III. Its application to state relations; IV. Modern suzerainty.

I. Direct evidence is wanting to show when, where, and by whom the word *suzerain* was coined. Indirectly it may be inferred as probable that it appeared about the beginning of the fifteenth century, at or near Angers. It is French; unlike the allied *sovereign* it has no cognate in the other Romance tongues, and no Low Latin form. It is commonly derived (by Littré and others) from *sus*—a derivation found in the Customs of Tours, 'qui vient du mot *sus*, pour dire qui est supérieur.' On the other hand, Pasquier (Rech. viii. 19) seems to treat it as identical with, and a mere corruption of, *souverain*. Again, the spelling in *sousserain estaige*, quoted by Godefroy from the archives of Angers in 1410, would suggest a derivation from *sous* in sense of 'sub-sovereign.' This, though it agrees with later French usage, does not fit in with the earlier meaning. Lastly, by a strange blunder, Furetière says, 'Ce mot vient de *Caesarianus*, selon Cujas et Pasquier.' As a matter of fact, Pasquier quotes only to reject the derivation by Cujas of *sergent* (not *suzerain*) from *Caesarianus*.

I am inclined to think that those who first framed and used the word combined the ideas of *sus* and *souverain* in one—perhaps even imagined that the latter was derived from the former. At all events they had not yet differentiated *suzerain* and *souverain* in meaning.

II. The earliest history of the word is found in the Customs. For the benefit of those who are not familiar with them it should be explained that they are, at least in their later development, *lex scripta* of which recensions were from time to time made by the three estates of the province or district in the form of a *procès-verbal*

confirmed by the king; many of these recensions dated between 1400 and 1600. While the majority are in French, a few are in Dutch, Spanish, or Latin. *Suzerain* occurs in the Customs of Bretagne (1456), Touraine (1506), Chartres (1508), Loudun (1517), Marche (1521), Bourbon (1521), Termonde (1611); also in those of Maine, Anjou, Tours, Poitou, all of uncertain date. In by far the larger number of the Customs it is not found as far as appears from De Richebourg's Coutumier Général or various works on local customs. When we consider that according to the standing maxim of the feudists custom was the 'règle principale des fiefs,' it is clear that the *word* at all events played very little part in the history of French mediaeval feudalism. It was rare, provincial, local, and sporadic. If we draw a circle of moderate radius from Angers as a centre, it will enclose all the examples above given, except Bourbon in the south and Termonde in the north-east, the latter so late as 1611 under Philip III of Spain. Again, it is never used of the king, except as holder of a particular fief, e.g. 'le roi, comme duc d'Anjou, a ressort et suzeraineté.' It is almost confined to this *droit de ressort*, the reciprocal right of a suzerain to have appeals brought to his court and of the unsuccessful litigant to resort thither. Not however entirely so confined, for in 1506, in the Touraine, we hear that where a seigneur has *droit de moulin* the arrière-vassal as well as the vassal must resort to the suzerain's mill.

But the most important distinction between the early and late use of the word has still to be noticed. Some writers of the last and many of the present century habitually speak of *suzerain* and *vassal* as correlative, as an English writer would of *lord* and *vassal* or *lord* and *tenant*. This is unknown to the fifteenth, sixteenth, and seventeenth centuries. If *B* holds land of *A*, and *C* of *B*, then *A* is seigneur to *B*, and suzerain to *C*. *B* is vassal to *A*, and seigneur to *C*. *C* is arrière-vassal to *A*, and vassal to *B*. Feudal suzerainty required three persons. This alone proves that the word in the mouth of a modern international jurist has travelled very far from its original meaning.

It has been said that the word *suzerain* is rare in the Customs. To express the relation of *A* to *C* as above, by far the commonest term is *seigneur souverain*; also we find *seigneur supérieur*, *chef-seigneur*, *seigneur par-dessus*, or even *seigneur dominant*, *féodal*, or *direct* aided by the context. The evidence is strong that from 1400 to 1600 there was no difference in meaning between *souverain* and *suzerain* when joined to *seigneur* as adjectives, or as nouns referring to it. Neither word imported royalty, nor even supremacy, only superiority. Any one was sovereign or suzerain who had two ranks of vassals below him. The king might be so termed, not

as king, but as lord of some great fief. The lowest seigneur at the other end of the scale (the English tenant paravail) and the seigneur immediately above him were excluded by the definition. All other mesne lords were suzerain to some arrière-vassal. Yet the word itself did not become common till it was ceasing to have its original exact meaning. First the word *souverain* began to be confined to a few, and more particularly to the king. Soon after the middle of the sixteenth century we find Pasquier defining *souverains* as those originally 'qui tenoient les premieres dignitez de la France, mais non absolument, nous l'avons avec le temps accomodé au premier de tous les premiers, je veux dire au Roy.' *Souverain* now denoted regality: we are passing away from the pure feudal system, where the distinction between royal and non-royal lords was not clearly drawn. *Suzerain* is now one who may be royal or not: the two terms are so far differentiated that the king as king is sovereign, as holder of some great fief is suzerain; a few great personages are both sovereign and suzerain; a number of others are suzerain only. As the royal power was consolidated and strengthened, the term suzerain was further limited to what we know as tenants *in capite*. 'Seigneurs Suserains,' says Furetière in 1727, 'sont les Ducs, Comtes, et autres grands Seigneurs possedans des fiefs de dignité, qui relevent immediatement du Roi.' As a still living word of the last century, it stood for the right of certain great lords to have appeals from lower local tribunals brought to their courts before going to the *Parlements* as the ultimate Court of Appeal. Owing to the vigorous action of Henry II and other causes such a system never developed in England; the nearest counterpart is perhaps the old 'regalities' of the Counties Palatine. In France suzerainty had become little else than local appellate jurisdiction; it was the judge quite as often as the lord who was called suzerain. Even before the end of the sixteenth century Du Tillet writes: 'Le Suserain est le superieur, ou le juge de ressort, autre neanmoins que le Roi. La Suserainеté est le droit de ressort que quelques grands Seigneurs du Royaume ont conservé.' And Pasquier applies the name to the king's judges in their appellate capacity—'Les juges royaux souverains que nous appelons maintenant suzerains.' Montesquieu (edition of 1750) has 'Tribunal Suserain,' and of the aggrieved arrière-vassal he says, 'Il appelloit devant son Seigneur Suserain.'

Now the remarkable thing is that in the last century, while the present meaning of suzerain was being cut down and restricted to a few great peers, its application to past history was becoming extended. It was already beginning to be used as an equivalent for *seigneur*. Thus in Brussel's L'Usage des Fiefs (1727) we find

'Tout *Suserain* avait cour plénière sur les vassaux,' while the title to the chapter runs, 'Tout *Seigneur* avait,' &c. This loose use of the word is still commoner in the present century. For instance, Meyer's Institutions Judiciaires (1823) has, 'On ne connaissait plus d'autre relation que celle de suzerain au vassal, et la règle, *nulle terre sans seigneur*, gouvernait presque tous les pays de l'Europe.' On the other hand Loisel (1846) uses the word strictly when he says, 'Le droit abandonné ou répudié [par un seigneur] était acquis et dévolu au seigneur suzerain, et ainsi de seigneur en seigneur répudiant jusqu'au roi.'

What was the origin of the *droit de ressort* which was the chief mark of suzerainty I am not here constrained to discuss. Du Tillet, we have seen, treats it as a right which certain great lords had succeeded in preserving. Loyseau, quoted by Merlin, describes it as 'usurpé par les particuliers,' calling suzerainty 'La dignité d'un fief ayant justice.' Pansey (1789) states, giving no authority, that before the reign of Philip Augustus (1181), on denial of justice by his seigneur, the vassal had no resource except to declare war. It was, he says, therefore laid down in this reign that in such case the vassal should be free to resort to the court of the *seigneur dominant*, i.e. the suzerain. Fustel de Coulanges (1890) seems to suggest a much older origin in the *immunités* granted in the seventh century, consisting in grants of local freedom from jurisdiction of the king's judicial officers. In a few cases, especially in some Flemish fiefs, I have observed that a different system of appeal prevailed, e.g. to the court of the *chef-bailly*, in lieu of the suzerain's court. It may here be remarked that in the last century there was a tendency in commentators to introduce the word suzerain where it was not found in the Customs themselves. Thus in Le Grand's Coustumes de Flandres (1719) we find in the index, 'fief-en-chef ou suzerain,' where the reference in the text has merely 'De tous les fiefs en chef,' as translation of 'Van alle hooft-leenen.' And in Maillart's Coutumes d'Artois (1756) is a note on Art. 33: 'Souverain Seigneur, c'est-à-dire Seigneur immédiat, dominant, ou suserain.'

One word should be said on the relation of the suzerain (*stricto sensu*) to his arrière-vassal. Bouhier in his Observations sur la Coutume de Bourgogne (1742) tells us that it had been a vexed question *An sit vassallus vassalli mei meus vassallus?*, as to which he decides that 'L'arrière est uniquement Vassal du Vassal, et non du Seigneur suzérain,' at least as to feudal incidents of service and (generally) profit; nevertheless the *seigneur suzerain* has *domaine direct*, mediate it is true, but with possibility of becoming immediate, e.g. by failure of heirs of intermediate seigneur.

We have seen that the word suzerain in the truly feudal times was but local, and even rare in the Customs. So with other documents. For instance, no small part of Fontannon's collection of the Edicts et Ordonnances des Roys (1585) is concerned with fiefs, but the word suzerain does not occur. Nor does it in Berault's Coustume de Normandie (1548), nor in many other old French books treating of feudal law. Nor again in Maître Husson's great argument in the case of Noirmontiers (1668), reported in the Journal du Palais, even though it turned chiefly on the position of the king as overlord of certain seigneuries in his character of Comte de Paris. Had it been an official term of general use, we should have expected to find it in some of the treaties, grants, settlements, or wills preserved in the *Corps Diplomatique* or elsewhere. Such documents in the fifteenth century are full of collocations like 'Souveraineté et Seigneurie, Hauteurs et Dommages, Fiefs, Arrière-fiefs & Justice haulte' (1420), or 'Droit de Superiorité, Souveraineté, autres droits quelconques' (1495). And in the next century Francis I describes himself 'comme vray Comte & Souverain Seigneur d'iceux' (1515). Again 'Fiefs, Hommage, Pairie & Serment de Fidelité, Ressort, Souveraineté sur le Comté d'Artois' (1555). In 1550, Charles V, not as Emperor, but as Seigneur of Overyssel, bestows Lingen on Anne d'Egmont, with condition that she and her subjects 'seront exempts de la Justice d'Overyssel & ne ressortirent illecq aucunement,' a clear case of abandoned suzerainty, but without express use of the word.

III. The notion of a state, clear enough in ancient times, was much obscured during the Middle Ages, and nowhere more than in France. It was not till recent times that the word suzerain was used to express even the relation of the king to the holders of great fiefs, as in Mably (1828), who writes (II. iv): 'Le roi, monarque dans toute la France, n'était encore (c. 1300) que le suzerain des ducs de Bourgogne, d'Aquitaine, de Bretagne, et du comté de Flandre,' and again, 'On distingua dans la personne du prince deux qualités différents, celle de Roi et celle de Seigneur suzerain. Il n'y avait aucun Seigneur, à l'exception de ceux qui possédaient les arrière-fiefs de la dernière classe, dont aucune terre ne relevait, qui ne fût à la fois vassal et suzerain.' He goes on to say that Hugh Capet and his successors themselves held fiefs of French nobles. Until it was possible to correlate suzerain with vassal instead of with arrière-vassal, there was no likelihood that any one would use the now familiar term 'suzerain state.' Vassal states there were indeed in plenty. Bodin (1586) says, 'Si jura majestatis non habeant fiduciarii seu vassalli, paucissimi admodum Principes

in summa potestate constituti reperiantur.' In his chapter on the relations of feudalism and sovereignty he describes 'novem genera tenuiorum adversus potentiores,' the first being states *in patrocinio* of others, the second not *in patrocinio* but tributary. Under one or other of these he seems to place all 'vassal states'—a classification hardly acceptable to modern jurists. Grotius (c. 1625) in his remarks on *imminutio imperii* carries the matter no farther. Vattel (1748) says, 'When *homage* leaves indefinite and sovereign authority in the administration of the state, and only means certain duties to the *lord* of the *fee*, or even a mere *honorary sovereignty*, it does not prevent the state being strictly *sovereign*.' Here the words italicized taken together present the whole idea of feudal state suzerainty. Such vassalage in earlier times had been extremely common, and, whether nominally real or personal, might mean little or a great deal, according to circumstances. This subject has been worked out in much detail in the above-mentioned article of Mr. Stubbs, especially as regards the different kinds of homage, of which it may be said that the majority of French writers of the eighteenth century, like Salvaing, in his L'Usage des Fiefs (1731), make only two, *hommage simple* and *hommage lige*, omitting *hommage ordinaire*. I will here only remark that, if Dr. Lingard's authorities are right, there are two examples earlier than the time of John when English kings professedly submitted to vassalage, viz. in 1176 when Henry II is said to have submitted to the Papacy in the words 'a domino Alexandro papa et catholicis ejus successoribus recipiemus et tenebimus regnum Angliae,' and in 1194 when Richard I after delivery of his cap to the emperor received restoration of his crown to be held as a fief of the Empire on yearly payment of £5,000. There were, indeed, few states that had not at one time or another been at least nominally fiefs of the Holy See or of the Empire. And so close was the connexion between these two that Grotius tells us that during any interregnum of the Empire the Pope conferred investiture of fiefs of the Empire. As to Naples, the stock example of a vassal state enjoying sovereignty as given in our modern text-books, De Raynval tells us, 'Les États de Naples, cependant un certain tems, fiefs de l'Empire, sont aujourd'hui (1771) le domaine direct du Pape.'

I am, however, more concerned here with the question whether the term suzerain was ever till quite recently bestowed on the superior state. It is not in the earlier French edition of Bodin, nor indeed, for reasons already given, could it well be looked for till the eighteenth century. I cannot find it so applied in any of the jurists or commentators. Had it been in ordinary use, there are treaties of the last century in which it must have occurred.

Take for instance two treaties between Louis XIV and the Duke of Lorraine in 1704, to distinguish their respective subjects in certain villages held in undivided sovereignty, where the word is not used, and compare these with the letters patent of 1826 referred to below. Or the treaty of 1751 between the Duke of Lorraine and the Count of Linange-Heiderheim concerning 'certains fiefs qui relévent immediatement et qui sont dans les ressort et souveraineté du duché.' Still more noticeable is its absence not only in the Treaty of Aix-la-Chapelle of 1748, but in all the cessions and protests made in connexion therewith by almost every power, great or small, that was not party to the treaty, especially the protest made by the House of Condé in connexion with the Duchy of Montférat, 'fief mouvant de l'Empire, érigé en Duché, possédé en toute Souveraineté.' The Treaty of Versailles in 1783 brings us very near the French Revolution, and is noticed here only out of contrast to the Treaty of Paris of 1814. In the former there is no mention of suzerainty. In the latter France renounces all rights of sovereignty, *suzeraineté*, and of possession over all countries, &c., beyond the therein defined frontiers. I believe this is the first official recognition of the word in state relations, and again emphasize the fact that the date is *after* the Revolution. In 1826 occurred the publication of letters patent of the Duke of Saxe-Coburg given by De Garden, in which are the words 'ceux de nos vassaux et sujets qui se trouvent en le cas de changer de Souverain et Seigneur suzerain,' &c. This is a plain reference to feudalism, though not to a vassal state under a 'suzerain.' As to the treaty of 1814, there is no interpretation of the word *suzeraineté*, and nothing to show whether it refers strictly to old fiefs of the kings of France, or is a mere 'general word' serving to sweep in every claim, however originating, to French domination beyond the frontiers. The conclusion is that up to the present century, though now so-called suzerain and vassal states were once common and still here and there remained, there was no well-recognized name for the former, while the latter were generally designated as fiefs, or the like. Meanwhile international law, not long born, was still struggling into growth and seeking for a terminology, for which French, now the recognized language of diplomacy, was a ready source.

IV. The present century has seen a revival of the words suzerain and suzerainty with changed meaning. It will be convenient to begin with the scientific jurists. Thus Heffter (1855) under the head of *Halbsouveränität*, after discussing federal union and confederation, proceeds to other kinds of modified sovereign autonomy, all of which his French translator Bergson describes as *très rares aujourd'hui*. These are (1) Voluntary restrictions on sovereignty or

state servitude (*Beschränkungen der Regierungsrechte*); (2) Agreements for mediatization and guarantee; (3) Feudal relations (*Lehnsverhältnisse*); (4) Treaties of Protection. As to (3) he says: 'A power having granted a sovereignty in fief, the sovereign of the one thus voluntarily becomes the feudatory of the other. The constitution of a fief gives rise to certain private rights and certain reciprocal duties between the suzerain (*Lehnsherr, dominus feudi*) and the vassal, especially that of mutual fidelity... The right of the superior power is commonly called *Hoheit, Oberhoheit*, and also *Suzeraineté*.' And he refers to the case of Naples.

Bluntschli (1874) says: 'When the sovereignty of a state is *derived* from that of another state, and consequently to mark this filiation one of them stands as against the other in a certain subordinate relation, the first is called a vassal state, and the other the suzerain state. Consequently, in the domain of international law, the independence of the vassal state must necessarily be restricted.' He notices how Naples gradually became completely sovereign and even a great power, and further instances the German States in the Middle Ages till their position was altered by the Peace of Westphalia; also the vassal states of Turkey; Mahometan, as Tunis, &c.; Christian, as Servia and others. 'History,' he says, 'shows that vassal states tend to complete independence; this change, already worked out in Western Europe, is still working out in the Empires of Turkey and Japan.'

Fiore (1885) says: 'Suzerainty denoted the aggregate (*l'ensemble*) of rights which the feudal lord had over his vassal. It is now employed to indicate the rights of the Ottoman Porte over its Principalities, but one cannot say that it has any very clear and precise signification.'

Holtzendorff (1887), after remarking that 'the mediaeval foundation of the distinction between superior and inferior powers rested on the universality (*Weltherrschaftsidee*) of Papacy, Empire, and Caliphate, which has no longer any existence,' continues, 'The distinctive mark in suzerainty is international effective obligation of protection (*Schutzpflichtigkeit*). The suzerainty of the Porte has assumed a *collective* form (i.e. belongs to the Powers) as well as the form of protection of its autonomy (*Selbständigkeitsrechte*) against the Porte. This is particularly shown by arrangements as to military operations in the Sudan, as to revenue, &c., being carried on without reference to the Porte.'

Hall (1890) says: 'States under suzerainty of others are portions of the latter which during process of gradual disruption or by grace of their sovereign have acquired certain of the powers of an independent community, such as that of making commercial

conventions, or of conferring their exequatur upon foreign consuls ... A state under suzerainty of another, being confessedly part of another state, has those rights only which have been expressly granted to it.'

The very latest pronouncement on the subject is perhaps that of Professor De Louter in the Revue de Droit International for 1896, p. 122. The defining part, as I have exhibited the others in English, I will venture to translate: 'The term suzerainty served to indicate a kind of dependence shown chiefly in external relations, which were subject to the superintendence or even to the complete management of the suzerain; sometimes matters did not rest there, and the dependent state paid tribute or was obliged to endure a greater degree of interference in its affairs.' Suzerainty, he says, in feudal Europe involved fealty and homage: the term has been extended to the Mussulman world, and to the control of European Powers through their Colonies over imperfectly civilized peoples.

I have set out these six descriptions in chronological order, because a comparison of them shows that, while there has been a widening of the meaning attached to suzerainty, there has been a corresponding weakening of the connexion supposed to exist between feudal and modern suzerainty. Here two remarks only need be made. Bluntschli is mainly right that vassal states have a tendency towards complete independence, but surely Japan is an exception: the tendency there seems to be towards centralization and consolidation of the superior power over the Daimios. Again, Mr. Hall's view seems retrograde, and the idea of his last sentence as above quoted is, I believe, unwarranted and erroneous.

Turning now to treaties, we find in the Protocol of 1828, that is, fourteen years later than the above-named Treaty of Paris, instructions given by the Powers for settling terms of boundaries, tribute, indemnity, and relations of suzerainty *to be established* between the Ottoman Porte and the Greek Government. By Art. 12, in order 'to mark the relations of suzerainty, the Porte is to participate in the devolution of the Chief Authority in Greece, but only by investiture.' In the previous Protocol of 1826 was no express mention of suzerainty; Greece was to be 'a Dependence' of Turkey, and to pay tribute: and by the Treaty of London, 1827, the Greeks were to *hold* under the Sultan 'as under a *Lord paramount*.' These proceedings, especially the italicized words, show the first instance of a modern suzerainty brought about by the action of third parties.

By the Treaty of Paris, 1859, Art. 28, 'Servia shall continue to *hold* of the Sublime Porte in conformity with the Imperial Hats which fix and determine its rights and immunities placed hence-

forward under the collective guarantee of the contracting powers;' and by Art. 22, 'Wallachia and Moldavia shall continue to enjoy under the suzerainty of the Porte and under the guarantee of the contracting Powers the privileges and immunities of which they are in possession.' This suzerainty was further regulated by a convention in 1858.

Mr. C. Stubbs is very anxious to make the case of Servia fit in with feudal conceptions, and to fix the moment at which it became a 'vassal state.' I think this is wasted labour. The Turkish Empire was modelled not on feudal principles; rather is it comparable with that of the great king and his satrapies, or other Eastern Empires. Servia, like other provinces, was under a pasha, tax-collector for a despot. It revolted; for a while there were both pasha and native chief, then under pressure from without Turkey withdrew the pasha, and the Powers dictated the conditions of semi-independence.

Noticing (to complete the European examples) that by the Treaty of Berlin, 1878, Bulgaria was to be 'an autonomous tributary Principality under the suzerainty of the Sultan,' we pass to Egypt. By the Convention of London, 1840, the hereditary Pashalick of Egypt was vested in Mehemet Ali on payment of tribute to the Sultan 'as his suzerain.' In *The Charkieh* (L. R. 4 A. & E. 59) it was held that the Viceroy was 'a subject Prince,' Egypt 'not even a semi-sovereign state,' mainly on five grounds:—(1) Egypt was named as a province in firmans; (2) its army was part of the Ottoman army; (3) taxes were levied in the name of the Porte; (4) it had no separate *jus legationis*; and (5) no separate flag. By firman in 1873 Nos. (2) and (4) were modified, Egypt being empowered to maintain armies and conclude *commercial* treaties. To the five points above should properly have been added (6) payment of tribute. Here again Mr. C. Stubbs, looking for feudal analogies and mindful that vassals of old owed military service, is delighted that Egypt in the seventies sent a contingent to the Russo-Turkish war. I do not here see any resemblance to the *ban et arrière-ban*; if not under the express provisions of some firman, I fancy it was a matter of grace on Egypt's part, or say rather of policy.

Coming to South Africa, we see that it was agreed by the Convention of Pretoria, 1881, that the Transvaal Republic should enjoy 'complete self-government, subject to the suzerainty of Her Majesty.' By Art. 2 Great Britain reserves the right (*a*) to appoint a British resident; (*b*) to move troops through the Transvaal in time of war or apprehended immediate war 'between the Suzerain Power and any foreign state or native tribe;' (*c*) to control external relations including treaties and diplomatic intercourse

with foreign powers, the latter to be carried on through Her Majesty's diplomatic and consular officers. Here (*a*) was probably copied from Indian and other Asiatic precedents, (*b*) and (*c*) are 'state-servitudes,' marking it is true superiority or greater strength in the *respublica dominans*, yet such as might conceivably be arranged between independent and sovereign Powers. By the Convention of London, 1884, the relation was modified: 'suzerainty' was omitted in the preamble; new articles were to be substituted when ratified by the Volksraad. By Arts. 3 and 4, 'If a British officer is appointed to reside within the South African Republic to discharge functions *analogous to those of a Consular officer*, he will receive protection, &c.,' and 'no treaty or engagement with any state or nation other than the Orange Free State nor any native tribe east or west shall be valid until approved by Her Majesty.' Thus provisions (*a*) and (*c*) above are modified, and (*b*) annulled, while the 'British officer' is placed nearly but not quite on the footing of a consul in a foreign independent state.

There is no mention of suzerainty in the Act of 1858 establishing the direct power of the crown in India, but in the Interpretation Act, 1889, it is enacted that in subsequent acts '"India" shall mean British India together with any territories of any native prince or chief under the suzerainty of Her Majesty.' The relations of such Indian States to the British Crown depend on numerous treaties. Briefly, British control consists in (1) restraining their right of making peace and war, sending embassies, &c.; (2) limiting the amount of their armies; (3) compelling submission to presence of British resident; (4) regulating residence of Europeans among them; (5) deposition in case of internal misgovernment; and in some cases (6) tribute.

There are also treaty rights of protectorate and direct control over some states bordering on India, as Baluchistan and Sikkim. All these are often called 'feudatories,' and many of them 'Protected States.' Near the Straits Settlements, Perak and four other states are 'under British protection,' while Johore is a more independent power. The chief points in the Colonial Office letter sent to the Court on occasion of *Mighell* v. *Sultan of Johore*, [1894] 1 Q. B. 149, were that between Great Britain and Johore there are 'relations of alliance and not of suzerainty and dependence' including 'protection from external hostile attack,' the Sultan 'not to negotiate treaties or enter into any engagement with any foreign state.' The Court held the Sultan to be 'sovereign,' the agreement not to enter into treaties being in the opinion of Kay L.J. no abnegation of sovereign right, but merely a *condition* of protection.

Comparing the above instances, we get a fairly precise idea of

modern suzerainty. It is immaterial whether or not the *respublica serviens* is 'derived' from the *respublica dominans*, and whether the relation is constituted by simple convention between the parties, or imposed from without. What is essential is that there must be (1) a real restriction of sovereign rights as against the former in favour of the latter, and (2) no *quid pro quo* (or *semble* an obviously and highly inadequate consideration) moving from the latter to the former. And (3) in practice it will be found where this is so that (as a matter of fact rather than law) the convention will be unilateral, i.e. it will be easy for the superior to terminate it, and difficult or impossible for the inferior to do so.

Lastly and above all, (4) the scope and extent of the restriction on sovereign rights will be found in, and only in, the treaty, convention, or other public document whereby the suzerainty is constituted. Any relation satisfying these four conditions may be justly said to create a suzerainty in the modern sense; no other can; subject to these conditions one instance may differ very widely from another.

Taking Heffter's four classes and adding a fifth, agreements for tribute, a modern suzerainty may assume forms (1), (2), (4) and (5), or any combination of such forms. On the other hand, (3) Feudal relation in the strict sense is obsolete; Kniphausen, sometimes quoted as a surviving instance, is not a state; its lord has not figured in the *Almanach de Gotha* for a hundred years. The remaining classes are on the increase, though the suzerainties of the future may soon be wholly over non-European states.

The view here presented will not be welcome to all. First, to the strict Austinians as well as to disciples of that French school for whom sovereignty is 'simple and indivisible,' who cannot accept the saying of Maine, 'The powers of sovereigns are a bundle or collection of powers, and they may be separated one from another.' In the feudal days the vassal power might be sovereign; the modern so-called vassal is at most half-sovereign, if that. I am not concerned to defend this 'arithmetical form,' as Holtzendorff calls it; I take it as well known and shorter than proposed substitutes. The elements of sovereignty are divided between 'suzerain' and 'vassal'; neither is wholly sovereign in respect of the *respublica serviens*. Secondly, the fourth condition above laid down will be unwelcome to those with whom suzerainty is a blessed word of unknown potency to conjure with. The glamour is gone, if it is but a short term for expressing the conditions set down in black and white in a treaty. We read that Great Britain has not only treaty rights in South Africa but also certain undefined rights as 'suzerain' or as 'paramount.' If this only means 'predominant'

and determined so to remain, I have nothing to say against it, and it applies not only to our dealings with the Transvaal but equally so to our relations with the Orange State[1]. Supposing for a moment that the suzerainty of 1881 has not been effectually abrogated, or that under the Convention of 1884 there is a 'virtual' or 'implied' though not an 'express' suzerainty, in my view this does not carry us a hair's breadth beyond the articles of that latter convention. The mediaeval lord had certain fairly well-understood rights over his vassal irrespective of any express provisions. So has the lord of a manor, so has the landlord of a house let on lease. The modern suzerain has nothing beyond his treaty rights; it is his own fault if they are not wide enough—or the fault of his then ministers or representatives. If they do not work out as he wishes, he can remonstrate, threaten, even go to war, just as (and only just so far as) he can with an independent power.

It does not fall within the lines here marked out to discuss the view of Mr. M'Ilwraith in the April number of this REVIEW on the possible responsibility of a suzerain for the vassal towards other Powers. It is enough to remark that this is not confined to suzerainty properly so-called. For instance, I take it that Great Britain by accepting a curtailment of certain sovereign rights of the Sultan of Johore, over whom she does not claim suzerainty, is as responsible for the consequences (morally, that is) as she is for the behaviour of any Indian or Malay 'feudatory.'

The time has come for revising the juristic definitions of suzerainty. I submit that in 1896 it is both true and clear, which in 1881 or 1884 was equally true, if not so clear, that the suzerainty of to-day has nothing in common with that of the fifteenth or sixteenth centuries save its borrowed, yet not (etymologically) inappropriate, name.

W. H. H. KELKE.

[1] There is no suggestion of suzerainty in any of the nine Articles of the Convention of Bloemfontein with the Orange Free State.

SUZERAINTY: A REPLY.

A WRITER in the *Manchester Guardian*, who does me the honour to devote an article to my paper in the last number of this REVIEW on the 'Rights of a Suzerain,' accuses me of 'learned childishness,' of 'trying to walk through a brick wall with my eyes shut,' and so forth, because I endeavour to show that Her Majesty's Government has the right to interfere in the internal affairs of the South African Republic.

His principal objection to my argumentation—the only one which I think calls for a reply—is that the late Lord Derby's dispatch concerning the draft of the convention of 1884 contained a declaration that the effect of the convention was to render such interference inadmissible.

I am of course perfectly aware of the dispatch in question, but I did not think it necessary to allude to it, inasmuch as it is not, in my opinion, very material.

In the first place, it does not form part of the treaty itself, but is a mere vague statement of the general effect of the convention, in Lord Derby's opinion, which was powerless to bind all future ministries and which, apart from the terms of the convention itself, has probably no greater value than the declaration of a minister in the House of Commons concerning the intended effect of a Bill under discussion.

In the second place, my critic does not appear to be aware that many treaties establishing Protectorates *expressly* declare that the Protecting State shall not intervene in the internal affairs of the Protected State, and yet, notwithstanding such a provision (which is what English lawyers call 'common form' and French ones 'une clause de style'), it is generally admitted that the Protecting State has not only the right but the bounden duty to interfere *whenever its international responsibility becomes involved* (see, for instance, Heilborn in the *Revue de droit international*, 1896, no. 2, p. 174). So that even had there been an express clause in the convention, instead of a mere declaration by the minister who concluded it, the circumstance would not affect the argument. I may recall Lord Castlereagh's opinion that intervention by one state in the internal affairs of another is justifiable 'whenever the immediate safety or the essential interests of the former are seriously compromised by the domestic transactions of the latter' (G. F. de Martens, *Nouveau*

Recueil de traités, t. v. p. 598), and that of Phillimore that such intervention is admissible 'whenever the internal institutions of a state are incompatible with the peace and safety of other states.' My point is that Suzerainty, which is apt to be regarded merely as an attractive agglomeration of more or less ornamental rights and privileges without any corresponding liabilities to speak of, is, in reality, a two-edged weapon, capable of being turned against the holder, and that in the present instance, the interpretation put upon the 1884 convention by the minister who concluded it, or even an express clause in such convention, had there been one, would not be a sufficient answer to foreign governments whose subjects were injured by our non-interference, and who, relying upon the principles to which I have referred, maintained that we had failed in our international obligation to exercise those rights which are the attribute—as I submit the inalienable attribute—of the Suzerain Power.

MALCOLM MCILWRAITH.

DIGESTS OF CASES.

THE increasing growth of case-law renders the issue of consolidated up-to-date Digests a matter of increasing importance, but it cannot be said that at the present time these Digests are in a satisfactory state. The last consolidated editions of Fisher's Digest and of Hurst's Equity Index are now more than twelve years old; most of the series of reports only issue Digests of a more or less fragmentary character; the Law Reports stand alone in having issued a Consolidated Digest, 1865–1890, which is now brought up to date by the 1891–1895 Supplement.

How comes it that when new editions of the Index to the Statutes are brought out every few years, there is no corresponding attempt to bring out new up-to-date editions of the Consolidated Digests? While quite admitting that in many ways the former stands on a somewhat different footing, I submit that the true cause which at present makes this impracticable is the imperfect system upon which these Digests are framed. If they were framed on such a principle that the entries in subsequent annual Digests could be inserted bodily in their appropriate places without any changes in the previous type, &c. (except such as were rendered necessary by alterations in the substance of the law), there is every reason to believe that new editions of a Consolidated Digest could frequently (and profitably) be issued.

The difficulties of the present system are best illustrated in the case of the most perfect Digests—those of the Law Reports to which I have referred. Passing by for the moment the immense size and complexity of these and the doubt as to whether, with it all, the cases on the statutes are arranged in the most convenient method, the gravest fault of the present system may be illustrated by considering the difficulties in the way of incorporating the 1891–1895 Supplement with the 1865–1890 Consolidated Digest. The 'Table of Cases' in the Digest contains at least 30,000 entries, each with a reference (in some cases more than one) to the column in which the case is set out, the 'Table of Cases followed, &c.,' has at least 7,000 references indicated by title, &c., and numerical position, and the 'Table of Statutes judicially considered, &c.,' contains fully 10,000 more compiled on the same principle. The cross-references

throughout the body of the Digest are also very numerous, 20,000 being probably a moderate estimate. To each of these classes must be added about a fifth more, corresponding to the 1891–1895 Supplement, and it will be seen that the mere consolidation of the two on the present system would (apart from any alterations in the substance of the law) involve the revision of fully 80,000 entries, none of which could be completed until the order of the cases under each title had been decided on, and of which about 35,000 could not be completed until the very column adjustment had been settled. And what will be the state of things, when the output of future years has vastly increased the material to be dealt with? No wonder that on such a system Consolidated Digests do not appear more often—the wonder is that they appear at all.

Is there no plan by which this complicated arrangement could be superseded, by which the latest Consolidated Digests could be brought up to date (save of course as regards alterations for changes in the law) merely by the appropriate insertion of entries taken from the subsequent annual Indexes, and by which a greater simplicity and clearness might be given to the whole? It is in the belief that there is such a plan and that it is easily practicable that the following suggestions are offered. They have special reference to the Law Reports Digests—for these are the best at present—but the principles are equally applicable to any others.

Digests of Statutes.

These should, I submit, be omitted, the Digest being confined practically to reported cases, and being framed on the assumption that the Index to the Statutes as well as the statutes themselves is available. The same remark applies to the case of the rules and orders. The treatment of both classes in current Indexes is dealt with later.

Cases on the Statutes.

These should be arranged under the statutes and sections to which they refer or in reference to which they were decided, being thus placed in a separate category from non-statutory cases. The statutes would, of course, be entered in chronological order.

Where one decision touches several statutes or sections it would naturally be entered under the principal one (or more than one if it was divisible) and cross-referenced under the others. Where a decision touches both a statute and also non-statutory law, it would be entered in like manner where most appropriate and cross-referenced from the other places.

Principles of Interpretation.—Cases involving general principles of interpretation should be entered under the appropriate statute and cross-referenced to the appropriate place in the non-statutory portion, or *vice versa*, as may be most expedient in the circumstances of each case.

Repealed Acts.—Decisions under these, unless they have lost all practical importance, should be entered in the usual way, repealed Acts being distinguished by a difference of type.

Consolidating Acts.—Decisions under the previous (consolidated) Acts should be entered with an appropriate note under the corresponding sections of the consolidating Act, and cross-referenced from the repealed Act or section.

Codifying Acts.—Where a codifying Act touches on the principle of a non-statutory case, that case should be entered as a statutory case under the corresponding section of the codifying Act with an appropriate note.

Subsequent Legislation.—Where a case has been overridden by subsequent legislation, an appropriate note should be added and the case cross-referenced under the new Act.

In suggesting the above principles of procedure it should, of course, be added that in many cases the entry of the superseded cases in the 'Table of Cases followed, &c.,' would be quite sufficient. In some cases an entry under the new statute (or section), simply to the effect that it supersedes the named case, would be an additional advantage.

To a limited extent these principles are recognized in the present system, but I submit that this is the simplest and most convenient basis for the full entries of statutory cases.

Colonial and Local, &c., Acts.

Decisions on these should be entered in separate tables, constructed and cross-referenced on the same principles.

Cases on Statutory Rules and Orders.

These should also in like manner be set out in a similar separate table, following, so far as the rules and orders under public general statutes are concerned, the system adopted in the official Index to these.

In the entries of statutory cases no attempt should be made to set out the statute or section, except for the quotation, e. g., of any phrase upon which the decision particularly turns. The compilation should, as before suggested, be made on the assumption that the statutes are available, and that the entry of the statutory case is by way of annotation.

This change would —

(1) facilitate reference to these cases ;

(2) produce the simplest and most perfect annotation to the statutes ;

(3) dispense with a vast amount of rubrics, of entries, and of cross-references on the present system ;

(4) facilitate revision in respect of consolidating and codifying Acts, repeals, &c. ; and

(5) greatly simplify the treatment of the remainder.

Non-statutory Cases.

The present order of entry should be substantially adopted, the elimination of the previous classes greatly simplifying the work.

Rubrics.—These should be limited to title, sub-title, and distinguishing word or words, adding any further head under which a cross-reference seemed desirable. The whole rubric should be printed in heavy type.

Arrangement of Entries.—These should be in the strict alphabetical order of their rubrics throughout. Thus, titles would be in alphabetical order, the sub-titles under each title in alphabetical order also, the distinguishing words under each sub-title in the same, and, where it went that length, the subsidiary distinguishing word under each distinguishing word the same. This arrangement of entering cases in the strict alphabetical order of sub-title, sub-sub-title, &c., would dispense with the numeration-restraint of the present system both in entries and cross-referencing, and would enable future entries to be inserted in due place without affecting previous ones.

Cross-references.—These should be to the rubric of the entry, setting that out as far as necessary. The strict alphabetical arrangement of sub-titles, sub-sub-titles, &c., would supersede the necessity of numbering the entries, and the work of revising these numberings in future editions. The fact that every cross-reference to a case was to be found in the rubric of the entry would greatly facilitate revision for changes in the law.

The Entries of the Cases.

In many instances these might be made more concise than at present. If the entry of a case in (say) Judge Chalmers' book on the Bills of Exchange Act be compared with the corresponding entry in the Digest, the advantage will generally be seen to rest with the former.

While it is impossible to generalize, it may be suggested that the words 'the plaintiff,' 'the defendant,' 'the appellant,' &c., should be avoided as far as possible, the entry of the initial of each party with any further description that may be necessary being shorter and simpler; also that the detailed consequences of the decision should be omitted, unless they involve some further point of law.

Printing.—With regard to this important detail, greater convenience and clearness might be secured by printing the entries across the page (as in the Indexes to the Revised Reports) instead of in double column. The whole rubric might be printed in heavy type, specific words or phrases and any case followed, &c., in italics, and the name of and reference to the actual case in capitals (as at present).

Table of Cases.

The digest-references to these should be by statute, &c., and (with non-statutory cases) to title, sub-title, &c., under which each is entered. As much of the rubric as was required to easily distinguish the case should be quoted, the entry being kept within due limits by abbreviations.

This plan would be quite as precise as the present one; with cases entered under more than one head it would show at a glance which entry was wanted, and, above all, once done, the same entries would be good for all future editions.

Table of Cases followed, &c.

These should, I submit, be entered across the page, the entry of the case being followed by the effective word ('followed,' 'overruled,' &c.), and that again by the entry of the subsequent case (or statute) in the usual reference form. The digest-reference (if wanted) could be easily found in the preceding table. This arrangement would be much more convenient than the present one, and, once done, the same entries would be good for future editions.

Table of Statutes judicially considered, &c.

This would be superseded by the arrangement of statutory cases. It might, however, be well to insert in place of it a table of the statutes there entered, arranged in the alphabetical order of their short titles. This would, of course, also be good for future editions.

Table of Titles.

This would be much shortened and simplified, if indeed it could not be dispensed with altogether.

Current Indexes.

These should be framed—so far as the cases are concerned—on the same principle. The compilation of succeeding quarterly issues would be simplified in the same way as succeeding editions of the Digest, though on a smaller scale, and the entries in the final issues could be simply transferred to their proper places in the Digest.

The entries of statutes, statutory rules and orders, and Parliamentary papers should be made in separate tables. It might also be possible to arrange the entries (so far as the statutes and the rules and orders were concerned) on the same principles as are now adopted in the Indexes to the annual volumes of these, so that such tables would coincide in the final part for each year with these annual Indexes, which in turn would be periodically superseded (as at present) by their respective consolidated Indexes.

With a compilation arranged on these principles, the preparation of even the next consolidated edition of the Digest of Cases would be much easier than on the present system, for the whole work could be compiled and corrected in 'slips' (to use a technicality), later cases could be appropriately inserted without affecting the references and cross-references to the others, and the whole could be issued very shortly after the expiration of the period covered.

For subsequent editions the reform would be far more advantageous still, for, save for alterations rendered necessary by changes in the law, the previous edition could be brought up to date simply by the transference to it of the entries in the subsequent annual current Indexes, compiled on the same principle.

Contemporaneous Consolidation.

The Incorporated Council of Law Reporting have, with some success I believe, been endeavouring to secure the quinquennial issue of future editions of the Index to the Statutes, including the Chronological Table. The corresponding issue of the Consolidated Index to Statutory Rules and Orders is also most desirable, and could a Consolidated Digest such as I have suggested also be issued—all quinquennially and all in the same years—it would be an important step to the much-needed unification of law-references.

J. Dundas White.

The following draft illustrates the application of the method above described to some of the cases of last year:—

TABLE OF CASES.

Borwick, Union Marine Insurance Co. *v.*, [1895] 2 Q. B. 279 ... INSUR. (M.)—Policy—Coll.

Cheesewright, Groome *v.*, [1895] 1 Ch. 730 ... 22–3 V. c. 127 (Solicitors, 1860), s. 28.

Flood *v.* Jackson, [1895] 2 Q. B. 21 ... { ACTION (CAUSE)—Induc. discharge—mal. / TRADES UNION—Tort of delegate.

Furness, Withy & Co. *v.* White & Co. { [1894] 1 Q. B. 483 / [1895] A. C. 40 } ... 57–8 V. c. 60 (Merch. Shipp. 1894), ss. 492–6.

Groome *v.* Cheesewright, [1895] 1 Ch. 730 ... 22–3 V. c. 127 (Solicitors, 1860), s. 28.

Guilford *v.* Lambeth { [1894] 2 Q. B. 832 / [1895] 1 Q. B. 92 } ... 51–2 V. c. 43 (Cty. Cts., 1888), s. 65.

Jackson, Flood *v.*, [1895] 2 Q. B. 21 ... { ACTION (CAUSE)—Induc. discharge—mal. / TRADES UNION—Tort of delegate.

Lambeth, Guilford *v.*, { [1894] 2 Q. B. 832 / [1895] 1 Q. B. 92 } ... 51–2 V. c. 43 (Cty. Cts., 1888), s. 65.

Lemmon *v.* Webb, [1894] 3 Ch. 1; [1895] A. C. 1 ... NUISANCE—abate.—trees.

Lloyd *v.* Nowell, [1895] 2 Ch. 744 ... ... VENDOR—contract—condit. precedent.

'Mecca,' The, [1895] P. 95 ... ... 24 V. c. 10 (Admiralty Court, 1861), s. 5.

Nowell, Lloyd *v.*, [1895] 2 Ch. 744 ... ... VENDOR—contract—condit. precedent.

Official Receiver, *ex p.*, *in re* Thurlow (Lord) } [1895] 1 Ch. 724 ... 46–7 V. c. 52 (Bkruptcy, 1883), s. 20 (1).

Thurlow (Lord), *in re*, *ex p.* Official Receiver } [1895] 1 Ch. 724 ... 46–7 V. c. 52 (Bkruptcy, 1883), s. 20 (1).

Union Marine Insurance Co. *v.* Borwick, [1895] 2 Q. B. 279 ... INSUR. (M.)—Policy—Coll.

Webb, Lemmon *v.*, [1894] 3 Ch. 1; [1895] A. C. 1 ... NUISANCE—abate.—trees.

White & Co., Furness, Withy & Co. *v.* { [1894] 1 Q. B. 483 / [1895] A. C. 40 } ... 57–8 V. c. 60 (Merch. Shipp. 1894), ss. 492–6.

TABLE OF CASES FOLLOWED, &C.

Hammond *v.* Pulsford, [1895] 1 Q. B. 223, *obsolete* ... 58 V. c. 5 (Shop Hours, 1895), s. 1.

Hawksley *v.* Outram, [1892] 2 Ch. 359, *distinguished* ... Lloyd *v.* Nowell, [1895] 2 Ch. 744.

'India,' The, 32 L. J. Ad. 185, *overruled* ... ... The 'Mecca,' [1895] P. 95.

Mackay *v.* Banister, 16 Q. B. D. 174, *distinguished* ... Guilford *v.* Lambeth, [1895] 1 Q. B. 92.

Statutory Cases.

3 & 4 Vict. c. 65 (ADMIRALTY COURT, 1840).

s. 6. See 24 Vict. c. 10 (Admiralty Court, 1861), s. 5.

22 & 23 Vict. c. 127 (SOLICITORS, 1860).

s. 28. A solicitor cannot obtain a charging order under this section if he has already accepted from his client a mortgage or other security for his costs in the pending action in which his client is a party. GROOME *v.* CHEESEWRIGHT, [1895] 1 Ch. 730.

24 Vict. c. 10 (ADMIRALTY COURT, 1861).

s. 5. These provisions apply to foreign as well as to British ships. *A* supplied coals to the *M.*, a foreign ship, at Alexandria and Algiers and advanced her canal dues at Port Said, and on the arrival of the *M.* in this country commenced an action *in rem* against her and arrested her. *Held*, that the Court had jurisdiction. *Semble* that in respect of the necessaries supplied at Alexandria and Algiers the Court had also jurisdiction under 3 & 4 Vict. c. 65 (Admiralty Court, 1840), s. 6, those places being '*upon the high seas*' within the meaning of that section. *The India*, 32 *L. J. Ad.* 185, overruled. THE MECCA, [1895] P. 95 (C. A. overruling Q. B. D.).

25 & 26 Vict. c. 63 (MERCHANT SHIPPING, 1862).

ss. 66–72. See 57 & 58 Vict. c. 60 (Merch. Shipp., 1894), ss. 492–6.

46 & 47 Vict. c. 52 (BANKRUPTCY, 1883).

s. 20 (1). Upon an application for adjudication of bankruptcy against a debtor under this section, the Court is not bound forthwith to adjudicate the debtor bankrupt, but may for good reason adjourn the proceedings under s. 105 (2); cf. s. 109. THURLOW (LORD) *in re, ex p.* OFFICIAL RECEIVER, [1895] 1 Ch. 724.

s. 105 (2). See s. 20 (1).

s. 109. See s. 20 (1).

51 & 52 Vict. c. 43 (COUNTY COURTS, 1888).

s. 65. This section applies, even though a counterclaim for unliquidated damages is set up. *Mackay* v. *Banister*, 16 *Q. B. D.* 174, distinguished. GUILFORD *v.* LAMBETH, [1895] 1 Q. B. 92 (C. A. affirming [1894] 2 Q. B. 832).

55 & 56 Vict. c. 62 (SHOP HOURS, 1892).

s. 4. The omission of a penalty in this section (*Hammond* v. *Pulsford*, [1895] 1 *Q. B.* 223) is supplied by 58 Vict. c. 5 (Shop Hours, 1895), s. 1.

57 & 58 Vict. c. 60 (MERCHANT SHIPPING, 1894).

ss. 492–6. Under the corresponding *ss.* 66–72 *of* 25 *&* 26 *Vict. c.* 63 (*Merchant Shipping*, 1862) it was held that where a shipowner deposits cargo with a warehouseman subject to a stop for freight under these provisions, and the consignee deposits the freight with the warehouseman and takes delivery of the goods from him, there is not to be inferred from such acceptance any contract by the consignee to be personally liable for the freight, and the Act creates no such liability. In these circumstances a consignee who is so named in the bill of lading, but who has no property in the goods, and who takes delivery only as agent for the owner, is not liable for freight. FURNESS, WITHY & CO. *v.* WHITE & CO., [1895] A. C. 40 (reversing C. A., [1894] 1 Q. B. 483).

58 Vict. c. 5 (SHOP HOURS, 1895).

s. 1. Remedies a defect shown by *Hammond* v. *Pulsford*, [1895] 1 *Q. B.* 223.

Non-Statutory Cases.

ACTION (CAUSE OF)—inducing discharge or non-employment—malice—master and servant. An action will lie against a person who maliciously induces a master to discharge a servant from his employment if injury ensues thereby to the servant, though the discharge by the master does not constitute a breach of the contract of employment. An action will also lie for maliciously inducing a person to abstain from entering into a contract to employ another, if injury thereby ensues to that other. FLOOD *v.* JACKSON, [1895] 2 Q. B. 21 (C. A.). See also **TRADES UNION—tortious act of delegate.**

Collision Clause, see **INSURANCE (MARINE)—Policy.**

Condition Precedent, see **VENDOR AND PURCHASER—Contract.**

Contract, see **VENDOR AND PURCHASER.**

INSURANCE (MARINE)—Policy—Collision Clause—Piers. *U.*, the insurer of a vessel, re-insured her with *B.* '*against risk or loss or damage through collision with . . . piers or stages or similar structures.*' The vessel was driven by storm against a sloping bank formed outside a breakwater (to protect the breakwater) by laying down loose boulders, and was totally lost. *U.* paid as for a total loss. *Held*, that *U.* could recover against *B.* under the clause. UNION MARINE INSURANCE CO. *v.* BORWICK, [1895] 2 Q. B. 279.

Master and Servant, see **ACTION (CAUSE OF)—inducing discharge.**

——————————**TRADES UNION—tortious act of delegate.**

NUISANCE—abatement—trees overhanging. The owner of land which is overhung by trees growing on his neighbour's land is entitled, without notice, if he does not trespass on his neighbour's land, to cut the branches so far as they overhang, though they have done so for more than twenty years. LEMMON *v.* WEBB, [1895] A. C. 1 (affirming C. A., [1894] 3 Ch. 1).

Policy, see **INSURANCE (MARINE).**

TRADES UNION—tortious act of delegate—responsibility of members—master and servant. The members of a trades union are not responsible for the tortious acts of a district delegate. FLOOD *v.* JACKSON, [1895] 2 Q. B. 21 (C. A.). See also **ACTION (CAUSE OF)—inducing discharge.**

Trees overhanging land, see **NUISANCE—abatement.**

VENDOR AND PURCHASER—contract—condition precedent—waiver. *L.* and *N.* signed a memorandum purporting to be an agreement for the sale by *L.* to *N.* and the purchase by *N.* from *L.* of a house at a stated price, '*subject to the preparation by the vendor's solicitor and completion of a formal contract.*' *N.* repudiated the agreement. *Held*, that *L.* could not waive the condition, and that the agreement was not enforceable against *N.* *Hawksley* v. *Outram*, [1892] 3 Ch. 359 distinguished. LLOYD *v.* NOWELL, [1895] 2 Ch. 744.

Waiver, see **VENDOR AND PURCHASER—contract—condition precedent.**

SEISIN.

IN his discourse on 'The Vocation of the Common Law,' recently printed in this REVIEW [1], Sir Frederick Pollock, in speaking of 'the Germanic idea which lies at the root of our whole law of property, the idea of seisin,' remarks: 'So much has this idea been overlaid with artificial distinctions and refinements in the course of seven centuries, that it is possible even for learned persons to treat it as obsolete. Nevertheless it is there still.' The learned persons here referred to cannot be said to proclaim their faith on the housetops. Certainly no expression of such a belief is to be found in the works of modern writers on real property law [2]; on the contrary, they all treat seisin as an essential part of the existing law. So recently as 1877, the late Mr. Joshua Williams delivered a course of practical lectures to students in conveyancing under the title of 'The Seisin of the Freehold.' All living writers on real property law also treat seisin as a fundamental part of it. It may be instructive to inquire which of these contending parties is right: those who consider seisin as the basis of our modern law, or those who think that it is obsolete. It may perhaps be found that the truth lies somewhere between the two extremes.

Much light has recently been thrown on the meaning and importance of seisin in the early stages of our law by Professor Maitland and others [3], but for the present purpose it is unnecessary to go back farther than the latter part of the last century. Even then there was much discussion as to the true nature of seisin and disseisin. 'The more we read,' said Lord Mansfield in 1757, 'unless we are very careful to distinguish, the more we shall be confounded [4].' His definition of seisin is as follows: 'Seisin is a technical term to denote the completion of that investiture, by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass [5].' Butler [6], Preston [7], and

[1] L. Q. R. xi. 323.

[2] [*Distinguo.* All—or nearly all—writers on the law of real property are learned, but not all learned persons know their real property law. I purposely named no names and gave no examples at Harvard, nor shall I now. The idea to which I referred was the genuine idea of seisin as possession recognized by law, before it had been sophisticated by a series of fictions. I quite agree with Mr. Sweet that the tendency of modern law is to restore this.—F. P.]

[3] The Seisin of Chattels, L. Q. R. i. 324; The Mystery of Seisin, ii. 481; The Beatitude of Seisin, iv. 24, 286; Pollock and Maitland, History of English Law, ii. 29 seq.

[4] *Taylor* v. *Horde*, 1 Burr. p. 110.

[5] Ibid., p. 107.

[6] Note to Co. Litt. 266 b.

[7] Abstracts, ii. 281.

Cruise[1] use the same language. Many modern writers define seisin as the feudal possession of an estate of freehold, while others define seisin as the possession of a freeholder, without laying stress on its feudal nature[2]. It may indeed be doubted whether the older writers did not use the word 'feudal' as a kind of warning to prevent the reader from thinking that any concise definition of the term could give an accurate notion of what it imports. Be that as it may, none of the definitions cited above are wholly satisfactory. Lord Mansfield's definition is more applicable to the ceremony of livery of seisin than to seisin itself, while the definition of seisin as possession does not lay sufficient stress on what is really the most important element in seisin—the element of title[3]. Preston recognized this element, for after defining seisin in the language used by Lord Mansfield, he adds: 'Seisin is correctly investiture, or an estate in the land, according to the feudal relation. . . . A man who has a seisin necessarily has an estate[4].' A still more complete description of seisin is to be found in Mr. Lightwood's work on the Possession of Land[5]: 'Like the *possessio* of the Roman law, seisin is ascribed only to a person who possesses as owner—in the language of the English law, as freeholder.' Seisin 'touches not only the possession, but the title. Under the old law the owner who was not seised, in addition to losing the beneficial enjoyment of the land, lost also many important incidents of his right of property[6].'

It is for want of keeping in mind this twofold aspect of seisin that a certain amount of ambiguity and confusion has crept into our books. Let us first see how far seisin, considered as the feudal possession of a person having a freehold estate in land, is still of practical importance in our law.

About six months ago the present writer had occasion to draw a charter of feoffment for the conveyance of a piece of land by an infant under the custom of gavelkind. Precedents of feoffments are to be found in several modern works on conveyancing, but dim recollections of certain inconvenient qualities peculiar to this mode of assurance suggested the advisability of referring to some work of

[1] Digest, i. 58.

[2] Watkins on Descents, 108; Williams on Real Property (third edition), 78, 116; seventeenth edition (by Mr. T. Cyprian Williams), 35; Seisin of the Freehold, 2; Challis, Real Property, 54.

[3] In the old books 'seisin' and 'freehold' are almost synonymous terms: see Littleton, § 448; Co. Litt. 266 b. 'In the most solemn acts of law, we express the strongest and highest estate that any subject can have by these words: "he is seised thereof in his demesne as of fee."' Bl. Comm. ii. 105.

[4] Preston, Abstracts, 282.

[5] P. 5. See also Pollock and Wright on Possession, 47 seq.; Challis, R. P. 205 seq.

[6] Lightwood, 42.

greater antiquity. Every diligent student knows that a feoffment derives its efficacy from 'the livery of seisin evermore inseparably incident to it[1]': that livery of seisin is 'a solemnity or overt ceremony,' and that it must be made according to certain rules, 'for this is of the essence of a feoffment[2],' but the student, and still more the practitioner, may be excused if he does not carry these rules in his head. The feoffor must have possession of the land. If any person claiming an estate in it is present when livery is to be made, he must join in the livery or be removed from the land, unless he is a lessee for years, in which case his assent is sufficient[3]. Where two parcels of land comprised in one feoffment are in different counties, or leased to different tenants, livery must, as a general rule, be made of each parcel separately[4]. As to the livery itself, it must be made openly, in the presence of witnesses, and by apt spoken words, accompanied by some act or gesture showing an intention on the part of the feoffor to give, and on the part of the feoffee to take, possession of the land[5]. Going on the land with the feoffee and giving him the charter of feoffment, is usually sufficient to show such an intention on the part of the feoffor, if he also uses apt words, but 'livery that hath an act or ceremony in it is the best, because it taketh the deepest impression in the witnesses. The most usual, formal and orderly manner of making of livery of seisin is thus, that the feoffor, donor, &c., and the feoffee, donee, &c., if they be present, or in their absence their attorneys or servants that have authority, do come to the door, backside or garden, if it be a house, if not, to some part of the land where seisin is to be delivered, and there, in the presence of many good witnesses, do show the cause of their meeting, and openly and plainly do read the deed, or declare the contents thereof, and of the letter of attorney, if there be any. And then the feoffor or his attorney (if it be a house) do take the ring, latch or hasp of the door (all the people, men, women and children being out of the house): or (if it be a piece of ground) do take a clod of the ground, or a bough or twig of a tree or bush growing thereupon, and (all the people being out of the ground) the same ring, &c., clod, bough, &c., with the deed do deliver to the feoffee, donee, &c., or to his attorney, and in the delivery thereof do use these words, or some such like words, viz. "I deliver these to you in the name of seisin of all the lands

[1] Sheppard's Touchstone (Preston's edition), 203, 204. [2] Ibid. 209.
[3] Shepp. 213; Perkins' Prof. Book, §§ 218 seq. As to livery within the view, which need not be here considered, see Bacon Abr. *Feoffment* (A).
[4] Shepp. 207.
[5] Shepp. 214; Co. Litt. 48 b; *Sharp's Case*, 6 Rep. 26; *Thoroughgood's Case*, 9 Rep. 136 b; *Vaughan* v. *Holdes* (1605), Cro. Jac. 80; *Maund's Case* (1608), Loy, 2; Challis, R. P., 365 seq.

and tenements contained in this deed, to have and to hold according to the form and effect of the same deed." Or, "I deliver you seisin and possession of this house, or ground, in the name of all the lands contained in the deed, according to the form and effect of the deed." And then, if it be a house, the feoffee, &c., doth enter in first alone, and shut the door, and then he doth open it and let in others[1].'

These are the formalities used in ordinary cases. Where the feoffment is made by an infant under the custom of gavelkind there is an additional requirement, namely, that the infant must deliver seisin *propriâ manu*, and not by attorney, and especial care must be taken that the ceremony is duly performed, for the custom is strictly construed[2].

The survival of this picturesque mode of conveying land is sufficient proof, if proof be needed, that seisin is a living part of our real property law. But the very contrast between a feoffment and an ordinary deed of grant also shows how little seisin counts for in matters of conveyancing at the present day. Nothing can be less ceremonious or picturesque than the 'completion' of an ordinary purchase. Even where the lord of a manor admits a tenant to copyholds and grants him 'seisin by the rod,' the ceremony generally takes place in a dingy office, the lord is represented by his steward and the 'rod' by an office ruler or an umbrella. Moreover, this is only customary seisin, and not seisin of the freehold. The history of modern conveyancing consists of a series of successful devices invented by conveyancers for the purpose of avoiding the necessity of the 'overt ceremony' of livery. The success of these devices has been frequently lamented, but it has been ratified by the legislature, and now, for all purposes of ordinary conveyancing, seisin is completely obsolete. It is true that in theory every assurance taking effect under the Statute of Uses depends for its operation on the seisin of a grantee to uses, but the amount of seisin required for this purpose is so extremely small that it is little more than nominal[3].

Seisin, however, was formerly of importance in matters uncon-

[1] Shepp., Touch. 214, 215.

[2] Challis, Essay on Assurances (prefixed to the fifth edition of Comyns on Abstracts), 52. See *Re Maskell and Goldfinch*, '95, 2 Ch. 525, where the Court refused to force upon a purchaser a title depending on a feoffment by infants.

[3] The nature of the seisin required to put the Statute of Uses in operation and to keep it in operation, was formerly much discussed: see *Chudleigh's Case*, 1 Rep. 120; *Brent's Case*, Dyer, 340; *Yelverton* v. *Yelverton*, Cro. Eliz. 401; *Wegg* v. *Villers*, 2 Rolle Abr. 796; Fearne on Cont. Rem. 286 seq. As to the doctrine of *scintilla juris*, see Sanders on Uses; Hayes, Int. to Conveyancing, and the early editions of Sugden on Powers. Ever since the Stat. 8 & 9 Vict. c. 106 was passed, it seems to have been assumed without question that a deed of grant of freehold land in possession vests in the grantee a sufficient seisin to support uses taking effect under the Statute of Uses. The nature of the seisin which passes by such a deed is referred to infra (p. 245) in connexion with the law of curtesy.

nected with the conveyance of land by absolute owners. In order to clear the ground it is worth while to consider these matters for a moment, even at the risk of stating some elementary propositions. Dower, as well as curtesy, formerly depended on seisin. Seisin was the basis of the law of descent, for descent was traced from the person last seised. Seisin was essential to a devise of land, for if the testator was disseised of the land, whether at the time of making his will or at the time of his death, the devise was void. Fines and recoveries, and consequently the validity of dispositions by tenants in tail and married women, depended on the question of seisin. Fines were also used to confirm possessory titles, whence it followed that the goodness of a title by adverse possession might depend on the question of seisin. Apart from this mode of obtaining a title by adverse possession, it may be said that the law of limitation in former times depended ultimately on seisin, for though in most cases a man who had been in adverse possession of land for twenty years was practically safe from attack, yet he was often liable to have the land recovered from him in a real action, and all real actions were founded on seisin. The learning as to descent cast, the acquisition of seisin by mere entry and continual claim, and the rule prohibiting the assignment of choses in action real (i.e. rights of entry and action in respect of land) also belong to this branch of law.

Theoretically, therefore, seisin was of great importance, but practically this importance was much diminished by rules and presumptions of law, invented or sanctioned by the judges for the purpose of avoiding the practical inconvenience caused by the doctrine of seisin. Thus a feoffment was frequently allowed to take effect as some other kind of assurance (e.g. a covenant to stand seised) in order to cure some informality in the livery of seisin[1]. If the execution of a feoffment could not be proved, possession of the land by the feoffee for twenty years gave rise to a presumption that livery of seisin had been properly made[2]. An actual ouster of one tenant in common by another would be presumed from a similar length of possession[3], and uninterrupted possession for twenty years was *primâ facie* evidence of an absolute title[4]. Some of these rules appear to be applications of a much wider principle, viz. that mere possession is *primâ facie* evidence of a seisin in fee[5]. These rules were invented for the express purpose

[1] *Doe* d. *Lewis* v. *Davies* (1837), 2 M. & W. 503.
[2] *Doe* d. *Wilkins* v. *Marquis of Cleveland* (1829), 9 B. & C. 864.
[3] *Doe* d. *Fisher* v. *Prosser* (1774), Cowp. 217.
[4] *Stokes* v. *Berry* (1699), 2 Salk. 421; s. c., sub nom. *Stocker* v. *Berny*, 1 Lord Raym. 741; *Denn* d. *Tarzwell* v. *Barnard* (1777), Cowp. 595.
[5] *Allen* v. *Rivington* (1671), 2 Saund. 110 a; *Jayne* v. *Price* (1814), 5 Taunt. 326; *Doe* d. *Carter* v. *Barnard* (1849), 13 Q. B. 945; *Asher* v. *Whitlock* (1865), L. R. 1 Q. B. 1; Williams on Seisin, 7.

of getting rid of the inconvenient doctrine of seisin. The great obstacle in the way of protecting adverse possession not based on seisin was the existence of real actions and proceedings by fine and non-claim. The judges did their best to render these remedies harmless by making their use difficult and dangerous. The Commissioners on the Law of Real Property, in their report on the state of the law in 1829, remarked on the scandal brought upon the administration of justice by the efforts of the judges to discourage real actions, 'which these learned persons have thought so mischievous, that they might be usefully and properly defeated by any means,' so that in many cases the claimant failed, not from the badness of his cause, but 'from the Court taking upon itself indirectly to defeat a remedy still tolerated by the legislature.' The result was that though within the preceding hundred years many real actions had been brought, only a very small number had succeeded. So the proceeding by fine and non-claim was too uncertain to be really useful: 'Like other laws, at variance with the general feelings of mankind, it has given rise to strained decisions by courts of justice[1].'

Seisin, therefore, had been deprived of much of its practical importance before the statutes of 1833–1845 were passed to amend the law of real property. The Limitation Act of 1833, the Fines and Recoveries Act, the Dower Act, the Inheritance Act, and the Wills Act, and the Acts 7 & 8 Vict. c. 76 and 8 & 9 Vict. c. 106, by abolishing the anomalies and obsolete remedies to which the Commissioners had drawn attention, and by establishing new rules as to adverse possession, dower, and descent, and as to wills and conveyances of land, deprived seisin of its theoretical as well as its practical importance in all cases except two, viz. (1) where land is conveyed by a feoffment which cannot operate as any other mode of assurance; and (2) where a man claims an estate by the curtesy.

The natural result of these piecemeal reforms was to leave open some questions which are of rare occurrence in practice and yet occasionally cause difficulty. Thus the rule that in ordinary cases a husband cannot claim curtesy of his wife's lands unless she was actually seised of them, is derived from the old rule that descent was traced from the person last seised[2]: consequently, when the legislature abolished the test of seisin in the case of descent, but left it still applicable to curtesy, the question arose whether on the death of a woman taking by descent under the new law of inheritance, her husband could under any circumstances claim curtesy of her lands. This question is still open[3]. Again, the old mode of

[1] First Report Real Prop. Comm. 42, 43. [2] Bl. Comm. ii. 128.
[3] Williams, R. P., App. (D); *Eager* v. *Furnivall*, 17 Ch. D. 115; Challis, R. P. 315.

conveying land by lease and release, or by statutory release [1] or statutory deed [2], vested the seisin of the land in the purchaser in the same way as if it had been conveyed to him by feoffment with livery of seisin, so that if land was conveyed to a woman by one of these modes, the mere conveyance gave her an actual seisin sufficient for purposes of curtesy without the necessity of her making an entry on the land. Whether this is the effect of a conveyance by deed of grant under Stat. 8 & 9 Vict. c. 106 is not clear. There is no doubt that the intention of the framers of the Act was to give to a simple deed of grant the same effect as that of a feoffment or lease and release [3], and this was the interpretation put upon the Act by text-writers shortly after it was passed. Thus Mr. Shelford says: 'Livery of seisin is rendered unnecessary by this section [4].' So Mr. Joshua Williams stated the effect of the Act to be that 'a simple deed of grant is now sufficient to convey the freehold or feudal seisin of all lands [5].' Mr. Tudor says that if property is conveyed by grant by *A* to *B* and his heirs to the use of *C* and his heirs, 'then the seisin is conveyed from *A* to *B* and executed by the Statute [of Uses] in *C* [6].' Mr. Challis also speaks of 'the abolition by the above-cited statute of the necessity for livery of seisin [7]' as something to be taken for granted. On the other hand, Mr. Lightwood inclines to the opinion that though a deed of grant passes 'a statutory seisin,' the grantee is not actually seised until he enters [8]. On principle this would appear to be the correct conclusion, for the Act does not profess to give to a grant of the immediate freehold a greater effect than it has at common law in the case of an incorporeal hereditament. Now a person entitled to a freehold estate in reversion or remainder expectant on a particular estate of freehold has not seisin in the sense of having the feudal possession of the land. When we say that a remainderman or reversioner is seised [9], we mean that he has a vested estate [10]. So far as the feudal possession is concerned he has no seisin either in deed or in law, and even when the particular estate determines he

[1] Stat. 4 & 5 Vict. c. 21. [2] Stat. 7 & 8 Vict. c. 76.
[3] See the note on the Act in Shelford's R. P. Statutes. [4] Ibid.
[5] R. P. (third edition, 1852) 146. [6] L. C. on R. P. 350. [7] R. P. 377.
[8] Poss. of Land, 35. The same view is taken by the editors of Goodeve on R. P. (third edition) 364. [9] Co. Litt. 277 a.
[10] Watkins on Descents, 27, 109. There seems to have been at first some question whether a person entitled to a reversion or remainder expectant on an estate of freehold had a seisin sufficient to enable him to convey it by bargain and sale under the Statute of Uses (Cruise's Digest, iv. 109; Challis, Essay on Ass., 62), but it is difficult to see how the question could arise, for the statute speaks of persons being seised of reversions and remainders, using 'seised' in the sense of 'entitled to a legal estate.' The sense in which seisin is employed in the Statute of Uses is probably the reason why it has always been assumed that a deed of grant under Stat. 8 & 9 Vict. c. 106 passes a sufficient seisin to support uses taking effect under the Statute of Uses (supra, p. 242, note 3); for the grantee of an estate in possession must have at least as much 'seisin' as the grantee of an estate in remainder or reversion.

has only seisin in law[1]: consequently, if during the continuance of the particular estate he grants his reversion or remainder to *A*, this vests the estate in *A*, but it does not give him actual seisin; when the particular estate determines *A* has a seisin in law which he must convert into an actual seisin by entry. So if the owner of a freehold estate in possession grants it to *A* under Stat. 8 & 9 Vict. c. 106, the grant vests the estate in *A*, but it does not give him actual seisin, and if *A* is a married woman her husband will not, it seems, be entitled to curtesy, unless she obtains actual seisin by entry or by the possession of a termor.

Seisin therefore is of practical importance at the present day in those rare cases where land is conveyed by an infant under the custom of gavelkind, and where a man claims an estate by the curtesy. And if a person, in framing a legal document, chooses to use the word 'seisin' where it is not appropriate, he runs the risk of having his intentions defeated[2]. But apart from these exceptional cases, it is submitted that seisin, considered as a special kind of possession, is of no practical importance at the present day. In other words, if the legislature were to abolish feoffments and make the law of curtesy similar to that of dower, seisin would be as obsolete as fealty[3].

[1] Watkins, 29, 30. As to the acts which, in the case of a reversion or remainder, were equivalent to actual seisin for the purpose of changing the root of descent under the old law, see Watkins on Descents, 110; Preston on Abstracts, ii. 441; Challis, R. P. 206.

[2] *Leach* v. *Jay*, 9 Ch. D. 42.

[3] Some points relating to the seisin of purely incorporeal hereditaments should be here noted. For purposes of descent, limitation, and recovery by real action, they practically stand on the same footing as land, except that in the case of advowsons the period of limitation is different and that rights of common, &c., are subject to special rules. The question of seisin can therefore hardly arise except in connexion with a claim to curtesy out of an incorporeal hereditament. In the case of an advowson or rent, the rule always was that if the wife died before the rent-day, or before the church became void, this did not deprive the husband of his right to curtesy (Co. Litt. 15 b).

Since the Stat. 4 & 5 Anne, c. 16, no question can arise as to the necessity of attornment for giving seisin of a seignory to a grantee.

As to advowsons, Stat. 7 Anne, c. 18, deprived the question of seisin of much of its importance, and it is difficult to see how any question can now arise except in the case of curtesy, above referred to. Before the Judicature Acts, the plaintiff in a *quare impedit* generally alleged that he was 'seised in fee' of the advowson (Steph. Pl. 42), but this was merely the traditional way of alleging his title (see *Grocers' Co.* v. *Archbishop of Canterbury*, 3 Wils. 221; *Robinson* v. *Marquis of Bristol*, 11 C. B. 208; *Carlisle* v. *Whaley*, L. R. 2 H. L. 407 seq.). As to the nature of the action of *quare impedit*, see Mallory, 154, 157, citing 21 Ed. IV. 1, 2; 3 Salk. 293; Booth, Real Actions, 223; *Marshall* v. *Bishop of Exeter*, 6 C. B., N. S., at p. 730; Common Law Proc. Act, 1862, s. 26.

With regard to rent-charges and rents-seck, the old doctrine was that seisin of a rent was necessary to enable the grantee to bring an action for its recovery. Mr. Cyprian Williams, in referring to this doctrine (L. Q. R. xi. 233, n. 6), says that it does not appear to be obsolete. *Sed quaere.* Littleton and Coke treat of the seisin and disseisin of rents chiefly in connexion with the grantee's right to bring an assise (Litt. §§ 235, 236; Co. Litt. 202 b); since the abolition of real actions this question cannot, it is submitted, arise. And since the passing of the Representation of the People Act, 1884, the problems discussed in *Heelis* v. *Blaine* (18 C. B., N. S. 90) and

If this is so, it may be asked why the word 'seisin' frequently occurs in legal documents at the present day. It is quite usual to insert in an ordinary deed of grant a recital that the grantor is seised of the land in fee simple, and to provide in conditions of sale that where the title commences with a will no evidence of the testator's seisin shall be required. The answer is that 'seisin' is here used in the sense of ownership or title. It has already been pointed out that 'seisin' imports title as well as possession, and when we stipulate in a contract of sale that the testator's seisin shall be taken for granted, what we really mean is that it shall be assumed that he was entitled to the land in fee simple. That this is the real meaning of the stipulation is obvious when we consider that mere 'feudal possession' of land by a testator would be a most unsatisfactory root of title; he might have the feudal possession and yet be only a trustee or mortgagee, or even a mere disseisor. Some modern conveyancers appreciate this ambiguity and avoid it by requiring the purchaser to assume that the testator was 'entitled to the land in fee simple in possession.' We use 'seisin' in the same sense when we insert in a conveyance of land a recital to the effect that the grantor is seised of the land in fee simple in possession, but here the practice has some justification, for such a recital, if properly framed, amounts to a 'certain and precise averment' that the grantor has the legal estate, and thus avoids any question as to whether it operates as an estoppel against him [1]. The recital is however sometimes used in order to obtain the benefit of sec. 2 of the Vendor and Purchaser Act, 1874: for this purpose such a recital amounts to a statement that the grantor is absolutely entitled to the land in fee simple [2]. Occasionally the recital is used where the grantor has not the legal estate, but is merely entitled to the equitable fee simple [3]. This use of the term 'seised' by professional lawyers makes it a little difficult to understand the decision in *Leach* v. *Jay* [4].

Lowcock v. *Broughton* (12 Q. B. D. 369) will in a short time cease to have any practical importance.

[1] See *Onward Building Soc.* v. *Smithson*, '93, 1 Ch. 1, where the authorities are referred to.

[2] *Bolton* v. *London School Board*, 7 Ch. D. 766.

[3] I have before me a precedent of a lease, given in a modern collection of deservedly high reputation, which contains a recital that the lessor is 'seised in fee simple in possession of the hereditaments hereinafter described, subject to a mortgage thereof in fee simple to A.' Here it is obvious that seisin has lost every vestige of its 'feudal' meaning except that of title.

[4] Supra, p. 246. Since this article was written I am glad to find the correctness of the view above put forward as to the modern meaning of 'seisin' confirmed by the following passage in the last edition of Goodeve on Real Property by Sir H. Elphinstone and Mr. J. W. Clark (third edition, 1891, p. 365), referring to the operation of conveyances at common law and under the Statute of Uses: 'The difficulty in understanding the meaning of transmutation of seisin arises from the change in meaning of the word seisin. Originally it meant the actual possession

If these conclusions are sound, there would seem to be some foundation for the contention that seisin, in the sense of feudal possession, has ceased to be the basis of our modern law of real property, and that ordinary possession has taken its place. But we are not out of the wood yet, and there are lions in the path.

In 1885, in the case of *Trustees' Agency Co.* v. *Short*[1], a question arose which has exercised the minds of conveyancers ever since the passing of the Real Property Limitation Act of 1833. In that case the plaintiffs and their predecessors in title had owned land in New South Wales (where the R. P. L. Act of 1833 is in force) for more than thirty years, but neither they nor their predecessors had ever been in possession, and when they attempted to take possession in 1885, they found that the defendant had anticipated them. He had not been in possession for twenty years, nor could he derive title under a previous occupier, but he proved that a person named Meredith had been in wrongful possession for some years before 1853, when he abandoned the land. The defendant did not take possession until some time after Meredith's abandonment. He contended, however, that the statute began to run against the plaintiffs from the time when Meredith took possession, and that as they did not enter on the land after Meredith abandoned it, the statute continued to run, and that consequently their right was barred. The Privy Council decided against this contention, holding that mere non-possession by the rightful owner is not sufficient: the statute does not run against him unless some other person has possession.

The decision does not seem to have met with universal approval. Mr. Challis, in an article entitled 'The Squatter's Case,' which appeared in this REVIEW[2], thought that the case might have been decided either under 'the general law of disseisin,' or under the Statute of Limitations, and that it was doubtful on which ground the Judicial Committee really decided it. 'Upon the first point,' he said, 'their lordships appear to have held that if a disseisor goes off the land without the intention of returning, this restores the seisin of the disseisee: in other words, it operates what is technically styled a remitter. . . . The proposition is by itself an ample ground to support the decision. If the plaintiff, at the time of the defendant's entry, had been remitted to his original seisin, it was quite superfluous to discuss the Statute of Limitations, which (on that hypothesis) had no more to do with this case

of a freeholder: now it means "having the legal estate, either in possession or remainder or reversion," provided that it has not been turned into a mere right of entry, as where a wrongdoer has obtained actual possession.'

[1] 13 App. Ca. 793.

[2] L. Q. R. v. 185; reprinted in Challis on Real P., App. iii.

than it has to do with any other case.' Mr. Lightwood, too, thinks that the doctrine of seisin bears on the decision. With all respect to these learned writers, it is submitted that the case does not turn in any way on the question of seisin, disseisin, or remitter. Those terms do not occur either in the arguments or in the judgment, and it is difficult to see why they should, for the action was an action of ejectment and the defence was the Statute of Limitations. Mr. Lightwood puts the case thus. The seisin of a disseisor whose title has not been perfected by the statute is analogous to the case of possession under title: consequently it continues until it is put an end to by re-entry by the disseisee: meanwhile the title of the disseisor is good save as against the disseisee, and even as against him the disseisor ranks as freeholder until the true title is restored by re-entry: in *Trustees' Agency Co.* v. *Short*, Meredith was probably a disseisor, and if so his seisin continued until 1885, by which time the plaintiffs' title was barred. This doctrine as to the continuance of the seisin of a disseisor is no doubt correct, but there is a difficulty in applying it to the case under discussion, because the operation of the statute does not depend on any question of seisin or disseisin. The statute was passed for the express purpose of getting rid of the doctrines of seisin, disseisin, and remitter. The operation of the statute depends on the question of wrongful possession[1]. And there is this fundamental difference between the seisin of a disseisor and the possession of a wrongful or adverse possessor, that the former gives the disseisor a title in fee simple by wrong which continues until put an end to by the act of the disseisee, while the latter gives the possessor a title which, until it is perfected by the statute, is only co-extensive with his actual possession; if he abandons the actual possession his title is gone. In the case under discussion, when Meredith took possession the statute began to run against the true owner, but when he abandoned possession it ceased to run, because there was no one whom the true owner could evict, or against whom he could bring an action of ejectment; there was no longer a wrongful possession on which the statute could operate. Test it in this way. When Short took possession, was he a trespasser against Meredith? Could Meredith have brought an action of ejectment or trespass against him? Clearly not[2]. Meredith had lost all the rights of a wrongful possessor: his inchoate title under the Statute of Limitations was destroyed by his abandonment of possession, and the title of the true owner became as absolute as if Meredith had never taken

[1] The difference between a disseisor and a wrongful possessor is not modern: see *Matheson & Trot's Case* (31 & 32 Eliz.), 1 Leon. 209.

[2] See *Brown* v. *Notley*, 3 Ex. 219.

possession. This is not the doctrine of remitter. It is an application of the principle that when a man gives up a right which he has in respect of some one else's property, the relinquishment enures for the benefit of that some one else without the necessity of his doing anything. Another application of the same principle may be found in the law of easements. If *A* has a right of way over *B*'s land, and ceases to use it for such a time and under such circumstances as to show an intention of abandoning it, the right is extinguished; but it is not necessary that *B* should erect barriers across the way or do any other act to show his resumption of ownership: the mere abandonment by *A* is sufficient. So in *Trustees' Agency Co.* v. *Short*, Meredith's abandonment of his inchoate title was, it is submitted, as effectual to restore the title of the true owner as if he had executed a release by deed.

It does not follow that an owner of land can safely allow it to be occupied by a series of independent trespassers, and it is not to be denied that *Trustees' Agency Co.* v. *Short* came perilously near being within the alternative words of the 3rd section of the R. P. L. Act 1833, for not merely the dispossession of the owner by a wrongdoer, but his own discontinuance of possession, is sufficient to put the statute in operation. It is clear that if a person who is entitled to land never takes possession of it, that fact of itself does not set the statute in operation; but if he has been in occupation and gives up possession under such circumstances as to show an intention to abandon the land altogether, this, it is submitted, will extinguish his title on the expiration of the statutory period, and vest the title in any one who happens to be in possession at that time, or—failing such an occupant—in the first person who takes possession afterwards. This is the construction to which Mr. Hayes inclined [1], and it is the only one which gives effect to the explicit words of the section. It was adopted in *Doe* v. *Bramston* [2], where deliberate abandonment of land for forty years was held to extinguish the owner's title. There are no doubt more recent cases in which judges have expressed the opinion that to constitute a 'discontinuance of possession' it is not enough that the owner should be out of possession, but that some one else must be in possession adversely to him [3]. In these cases, however, the question arose in connexion with minerals which the owner had never taken possession of, and there can be no doubt that they were rightly decided: it is obvious that a man who buys a vein of coal does not lose his title

[1] Introd. to Conv. (fifth edition, 1840) 246.

[2] (1835) 3 Ad. & Ell. 63. See also the judgment of Parke B. in *Rimington* v. *Cannon* (1852), 12 C. B. 18; and that of Bramwell L.J. in *Leigh* v. *Jack*, 5 Ex. D. 264.

[3] *M'Donnell* v. *M'Kinty* (1847), 10 Ir. L. R. 514; *Smith* v. *Lloyd* (1854), 9 Ex. 562. In *Rains* v. *Buxton* (14 Ch. D. 537) there was actual dispossession, and consequently

to it from the mere fact that he does not begin to work it within twelve (or twenty) years; he cannot 'discontinue' possession if he never had it. These cases cannot therefore be taken as overruling the principle on which *Doe* v. *Bramston* was decided.

Another instance in which an attempt has been made to revive the doctrine of seisin is where the question arises as to the Statute of Limitations running against an owner in fee whose land is occupied by a lessee for years. We are told that it is not correct to speak of the lessor as being in possession by means of his tenant: 'the possession of the tenant supports the seisin of the landlord [1];' *Bushby* v. *Dixon* [2] and *Doe* v. *Finch* [3] are cited in support of this proposition. The late Lord Selborne also appeared to think that *Bushby* v. *Dixon* had some bearing on the operation of the Statute of Limitations [4]. It is submitted that this is not so. The question whether the statute has begun to run against a lessor has nothing to do with seisin; it depends on whether the case falls within one of the rules laid down by the Act, which, as Mr. Hayes remarked, 'break in materially upon the principle of the old law [5].' Moreover, *Bushby* v. *Dixon* and *Doe* v. *Finch* are both obsolete authorities, for the question in the former was what kind of seisin was sufficient within the rule *seisina facit stipitem*, and in the latter, what kind of seisin would support a fine.

To sum up. The history of our law of real property, from the invention of uses down to the year 1845, consists largely of a series of successful attacks on the obscure and inconvenient doctrine of seisin. If the legislature had been consistent, and had abolished feoffments and made the law of curtesy similar to that of dower, seisin would be completely obsolete. As matters stand, the doctrine still exists for those two purposes, but for all others it is obsolete in everything but name. Seisin is no doubt an interesting subject of historical study, but to treat it as having a practical bearing on the modern law of adverse possession is to keep

> With phantoms an unprofitable strife,

and to add unnecessary difficulties to a subject which has sufficient difficulties of its own.

CHARLES SWEET.

the question of discontinuance of possession did not really arise. Since this article was in type, the editor has drawn my attention to the judgment of Kay L.J., in *Willis* v. *Earl Howe* ('93, 2 Ch. at pp. 553-4). In that case the question of discontinuance of possession does not seem to have been argued, and the remarks of Kay L.J. were directed to the question of continuous adverse possession. They do not appear to be quite consistent with the judgment of the Privy Council in *Soling* v. *Broughton* ('93, A. C. 556).

[1] Lightwood, Poss. of Land, 187. See also p. 271, where the question is discussed whether a person who wrongfully takes possession of land or holds over after his title has expired, has a seisin or 'quasi-seisin.'

[2] (1824) 3 B. & C. 298.

[3] (1832) 4 B. & Ad. at p. 300.

[4] *Lyell* v. *Kennedy*, 14 App. Ca. at p. 456.

[5] Introd. to Conv. 256.

THE MIXED COURTS OF EGYPT.

FOR centuries past Egypt has been a favourite resort of foreigners, many of whom have settled permanently in the country.

This led to the different governments of Europe demanding and obtaining 'capitulations,' which embodied the principle, in the case of a foreigner resident here, of his entire freedom from the control of the Turkish Government.

The most important, perhaps, was a capitulation granted in 1757 to the then King of France, which has served as a model for all subsequent ones. By these capitulations foreigners resident in Egypt were to be subject only to their respective consuls, who had full civil and criminal jurisdiction over them. The maxim of international law, *Actor sequitur forum rei*, was invariably applied in these cases, but the difficulty arose that though, if the defendant was adjudged guilty, costs might be awarded and recovered against *him*, yet if the plaintiff was unsuccessful in *his* action or prosecution, the consul before whom the case was tried had no power, although he might award costs to the defendant, to make the plaintiff or prosecutor pay them.

Up to 1840 Egypt was a constituent part of the Turkish Empire, in no way differing from other provinces under the Ottoman rule. But, although Mehemet Ali was not successful in obtaining the entire independence of Egypt, he succeeded at any rate in obtaining for it virtual autonomy, subject to an annual tribute of 750,000 Turkish pounds [1], with other provisions, the chief of which is that the Khedive cannot relinquish any privilege conferred upon him, or abandon any part of the territory he has acquired. He can conclude treaties with foreign powers, under the condition he does not injure thereby the political interests of the Empire.

Egypt, therefore, for judicial purposes, may be considered as quite distinct from Turkey. The many difficulties which, as the foreign population became larger, and commercial cases grew in number, the consular jurisdiction gave rise to, became a source of anxiety to the Egyptian Government, and, in consequence, the government made representations to the different foreign govern-

[1] 18s. 2d.

ments, pointing out the difficulties inseparable from the existing system, and asking their co-operation with the view of establishing a new one.

The Egyptian Government proposed a new judicial system on the following bases:—

(1) That the judicial administration should be entirely separated from the executive powers and should be independent of the consuls of the various powers.

(2) That there should be Mixed Courts, in which the European element would naturally enter.

The first approach was made to France by Nubar Pasha, and the French Government thereon ordered the appointment of a commission, which reported on the whole in favour of the reform desired by the Egyptian Government. This was in 1867. After this, communications were made by the Egyptian Government to the other European powers, and, after much diplomatic correspondence, conventions were made by the Egyptian Government with European Governments, and the new system was established in 1876 and has lasted till now, although it was stipulated that it should only last at first for five years[1], and that after each successive quinquennial period, any power that liked might withdraw from it, and go back to the old system. No power has done so, and it may be assumed that the Mixed Courts have proved satisfactory.

The introduction of the new law was prefaced by General Rules of Judicial Organization, which are 276 in number, and deal with the whole machinery of the new Courts[2]. These rules have been subsequently modified, and the following sketch will, I think, be found to be a correct statement of the Courts as they exist at present.

There are three Courts of First Instance, one at Alexandria, the second at Cairo, the third at Mansourah; the whole of Egypt is embraced in these three Courts.

The Court of Alexandria consists of twelve foreign and five native judges, that of Cairo consists of nine foreign and five native judges, and that of Mansourah of four foreign and two native judges.

These judges are divided among the different nationalities as follows:—Germany has two, Austro-Hungary two, France two, Belgium two, Denmark one, Spain two, Great Britain two, Italy two, Holland one, Portugal one, Russia two, Sweden and Norway one,

[1] As a matter of fact for the first few years it was renewed annually.

[2] [The text of the 'règlement d'organisation judiciaire pour les procès-mixtes en Égypte' may be seen in Prof. Holland's 'European Concert in the Eastern Question,' Oxford, 1885.]

the United States two. Switzerland did not join the convention, and has therefore no representative in the Courts.

It seems to me that this distribution of judges does not meet actual facts.

The most numerous foreign nationalities here are Greek and Italian, after them come the French, and although there are comparatively few English permanently resident here, yet the number of tourists is annually increasing, and half the commerce of Egypt is with England. On the other hand, Germans, Austrians, Russians, and Belgians are comparatively few, although there are, I must say, many important German firms.

Each Court is presided over by an honorary native President, whose duties are nominal, although he is paid a salary. The actual President is termed the Vice-President, and one presides over each Court.

He must be a foreigner, and must be elected by an absolute majority of the members of the Court. No Englishman has ever yet filled this honourable position. It is his duty to preside over the general meetings of the Court, to divide their work among his colleagues, and to exercise a general supervision over the business of the Court and over its officials. The judges cannot be removed from their office except for grave reasons affecting their honour or independence.

No Egyptian judge can accept any distinction or honour from the Government, e.g. in Egypt the Lord Justice Brett could not have been created Baron Esher. I am not sure that the Egyptian practice in this respect is not better than the English.

In England a judge has nothing to fear, but something to hope; in Egypt he has nothing to fear or hope for from the executive.

The foreign judges are nominated by the Egyptian Government, but it will do so after obtaining from the government to which the foreign judge belongs its recommendation and acquiescence.

There is a Court of Appeal at Alexandria, consisting of thirteen judges, four of whom are native and nine foreign. In this Court, Germany, Austria-Hungary, the United States of America, Great Britain, Greece, Italy, and Russia have each one representative, while France has two. I suppose the reason for the difference is that the Code administered is based on the Code Napoléon, but the difference does not seem to be sound.

Appeal can be made to the Court of Appeal from any judgment of a Court of First Instance, if the amount in dispute exceeds 8,000 piastres tariff[1], or if the amount is uncertain.

The judges are well paid in Egypt, a distinction being made

[1] The piastre tariff is about threepence.

between the foreign and native judges, the former receiving considerably more than the latter.

The foreign judges of the Court of Appeal receive £1600 per annum, the judges of the Courts of First Instance receive £1200 per annum; there is no pension, but to compensate for this from time to time the judges receive what is termed a gratification.

The vacation of the Courts is from July 1 to October 15 in each year. During that time the Court of Appeal does not sit. But in the Courts of First Instance one judge at least always remains to attend to urgent business.

The Courts do not sit also on Friday (the Mohammedan Sunday), on Sunday, the two Mohammedan feasts termed Bairam, Christmas Day, New Year Day, Easter Monday, Ascension Day, and All Souls' Day. From this it will be seen that the work of a judge in Egypt is not hard, for he has two holidays every week and the Long Vacation also.

A judge in Egypt who violates his professional duty, or does not abstain, whether in Court or out of it, from everything which may diminish confidence in what he does as a judge, or the respect in which the class to which he belongs is held, is subject to disciplinary measures. These are two: (*a*) warning, (*b*) penalties.

The warning may be given either in writing or by word of mouth. The penalties are: (1) The judge may be censured for what he has done. This must be a formal declaration of the fault he has committed. (2) He may be removed from his office. This can only be done after a charge has been made against him, addressed to the Vice-President of the Court to which he belongs. He must then appear, after a period of not less than five days, before the Court of Appeal, sitting with closed doors, and can only be found guilty if three-fourths of the Court find him so.

The advocates naturally form an important element in the Courts. To be inscribed on the roll of advocates a person must fulfil four conditions.

(*a*) He must possess the diploma of an advocate.

(*b*) He must have an untarnished reputation.

(*c*) He must live in Egypt.

(*d*) He must have attended at the office of an advocate or been otherwise employed in judicial matters for five years.

Advocates are only allowed actually to appear in Court after having exercised their profession in Egypt or abroad for eight years. This long period seems to be justified by the state of Egypt when the new system was introduced. There was then no provision for the teaching of the higher branches of law, and in some countries diplomas are easily obtained. But the period might now, I think,

be shortened. That a man must wait eight years before he can plead in Court, although he is duly qualified, rather shocks an English lawyer. The advocates form what is termed 'An Order of Advocates,' the head of which is termed *Bâtonnier*. From the Order is chosen an Executive Body, which is termed the Council of Advocates. The advocates, like the judges, are subject to disciplinary measures.

A mandatary is a person who is appointed by another man to represent him in legal proceedings. He need not be an advocate, and can even plead in certain cases in Court. The mandate must be a formal document, duly signed and attested. These mandataries are very numerous in Egypt. There are of course numerous officials attached to the Courts, but no mention need be made of them here; any one who knows the constitution of a French Court will know their names and duties.

Next as to the Law administered by the Courts. The law is divided into five Codes: (1) the Civil Code, (2) the Commercial Code, (3) the Maritime Code, (4) the Code of Procedure as regards the foregoing Codes, (5) the Penal Code.

It may be remarked as to these Codes that with the exception of the last, they are almost entirely a translation of the Code Napoléon, and as such do not call for much remark. But the Civil Code is prefaced by certain preliminary rules, some of which deserve notice. The new law had no retrospective effect. The actions already begun before the Consular Courts continued to be heard there until their final solution, but might, with the consent of the parties, be transferred to the new Courts. Excluded from the new Courts were all questions relating to marriage, divorce, intestate and testate succession, guardianship, and other questions relating to status.

The new Courts have jurisdiction in civil matters in all other cases between foreigners and foreigners or between natives and foreigners. In cases regarding land it was held that they have jurisdiction although plaintiff and defendant are of the same nationality, and if a mortgage exists on land the jurisdiction concerning its validity or effect belongs to them, but the Court of Appeal has lately taken the contrary view. They also have jurisdiction in all simple police cases. No change can take place in the law till after the expiration of each quinquennial period. In case the law is silent or unable to decide any matter, recourse can be had to our old friend natural law and the principles of equity, the equity of course not of *English* but of *Roman* law.

A somewhat startling clause to a student of international law is clause 14, which lays down that a foreigner can be cited before the Courts even for obligations contracted abroad.

The Criminal Code differs from the other codes in being a transcript almost throughout of the Ottoman Criminal Code. Another peculiarity of the Code is that it is only administered by the Mixed Courts to a slight extent; although the foreign Governments were willing to abandon the *Civil* Jurisdiction of their Consuls, they were unwilling to give up the *Criminal*. The result was a kind of compromise. The Mixed Courts have jurisdiction in criminal matters, but it is a very limited one. It only extends to simple police cases (contraventions), and to (1) offences committed directly against the judges and officers of the Courts while in the exercise of their functions, as force or violence or bribery; (2) offences committed directly against the execution of the judgments of the Courts; (3) crimes imputed to judges and officers of the Courts, when they have committed them in the exercise of their functions, or in abusing their functions.

It is evident that these cases are likely to be rare. The greater number of offences are still heard before the Consular Courts. But it seems to me that all criminal cases might be now transferred to the Mixed Courts, with the exception where the prosecutor and defendant are of the same nationality. The present system is incomplete. As I have pointed out previously, justice can be done if the defendant is found guilty, but if the prosecutor does not appear or the case is dismissed, although the consul of the defendant may award him costs, he has no power to compel the prosecutor to pay them. It seems that the only proceeding open to the defendant is to bring a civil action in the Mixed Courts for recovery of the sum awarded him, a proceeding both cumbrous and expensive.

Egypt has now reached such a settled condition in legal matters, that I think all criminal cases, where the complainant and defendant are of different nationalities, might with safety and advantage be handed over to the Mixed Courts, with a proviso that in the Court of Assize representatives of both the complainant and defendant should hear the case, together with a third judge of different nationality.

From the above sketch it will be seen that there is little room for an English barrister before the Mixed Courts. He could not succeed here unless he has a perfect knowledge of either French or Italian, to which he ought to add some knowledge of Arabic, for English is not allowed to be spoken in the Courts. Besides this, the procedure, which is derived from the French, is so totally unlike English procedure, that it would take a long time to master it. It would also be advisable, if an English barrister came, that he should take the degree of Doctor of Law. That degree, though of

no use to an English practising lawyer, is of great value here, as it places a man in a superior position to that of an ordinary advocate.

It will also be seen that the English occupation of Egypt has in no way interfered with the judicial and legal systems. They were here before we came, and would continue if we went away.

The only sign of the English ascendency, so far as relates to legal matters, is the fact that Sir John Scott is the Judicial Adviser to the Egyptian Government.

His authority, however, as regards the Mixed Courts, is of a very limited kind. The Courts for each quinquennial period, within the limits laid down by the charter which created them, cannot be interfered with, and the various foreign powers, practically, as we have seen, nominate their representatives. Nor can any judge be dismissed without the gravest reasons and for good cause shown. Thus the Judicial Adviser cannot in any way interfere with the Mixed Courts, nor has he made any attempt to do so. But it is provided that at each quinquennial period the codes may be revised on the proposal of the Egyptian Government and with the consent of the foreign powers, and there is reason to believe that several important changes in the law are contemplated, to take effect on the expiration of the present period. In this case the Judicial Adviser would have great power in suggesting what improvements and amendments he deems advisable. We must not forget to mention that alongside of the Mixed Courts there are the Native Courts which have jurisdiction over all disputes between natives. The native codes are essentially similar to the codes of the Mixed Courts.

The nomination of persons to the position of judges in these Courts is entirely in the hands of the Egyptian Government, which sometimes appoints foreigners. In the nomination of judges for the Native Courts, the Judicial Adviser has great weight. On their first creation in 1883 the native judges were not a success. But I am informed from various quarters that a great improvement has of late years been effected in the character and work of the native judges, great care having been taken by the Egyptian Government and the Judicial Adviser to nominate able and learned men, who have shown great activity and zeal in their duties. The question thus arises, would it not be desirable after a comparatively short period for the foreign governments to consent to the abolition of the Mixed Courts, so that all *civil* cases, at any rate, might be heard in the Native Courts? The existence of the Mixed Courts in Egypt is a serious blow to the autonomy of the Egyptian Government, which in theory at least is independent so far as regards its executive power.

The maxim 'No State can administer justice beyond its territory' is complemented by the maxim, Each State has the right and the *sole* right to administer justice *within* its territory.

The abolition of the Consular jurisdiction in civil matters has proved a success. I see no reason why, say after a period of ten years, the Mixed Courts should not also be abolished, and the Native Courts alone exist. As I have pointed out, the law administered by these two Courts is substantially the same, and thus the transition from one system to another would be easy.

Egypt has long been under tutors and governors in judicial and legal matters as well as in others, cannot she be trusted before long to walk alone?

W. E. GRIGSBY.

COLLISIONS AT SEA IN RELATION TO INTERNATIONAL MARITIME LAW.

A Necessary Reform in the Law of Collision [1].

1. *The Law of Collision where both to blame.*

Division of loss.

In the event of a collision between two ships through unskilfulness and negligence on both sides, the damage is, by the law of England, divided equally between the two vessels, however much the degree of fault may differ. Such was the law of the United States, but seems no longer to be so, as will be shown hereafter.

The loss lying where it falls. General average. Proportional rule.

The Dutch, German, Italian, and some other marine codes leave the loss where it falls, giving neither ship a right to recover.

Turkey and Egypt divide the damage according to the respective values of the vessels as a kind of general average.

In France, Norway, Sweden and Denmark, and in Belgium, Greece, Portugal, and Roumania, the judge apportions the blame between the two vessels and divides the total damage accordingly: if there is no difference in the degree of negligence, the loss is equally divided, or allowed to lie where it falls; if there is a difference the more guilty bears the greater part of the loss; the greater the blame the greater the damages.

On May 28, 1895, this same system was affirmed by the Court of Appeal (4th Circ.) of the United States in a remarkable opinion delivered by Judge Simonton. Finding one vessel grossly in fault and the other guilty only of an act of omission, the Court held that it would be manifestly inequitable to fix the latter with one-half of the entire loss, and decided to have the liability of each vessel measured by the degree of fault.

There are thus four systems:—

1. Division of loss.
2. Leaving the loss where it falls.
3. General average contribution.
4. Proportional rule.

That of leaving the loss where it falls cannot be justified except where the faults are equal, and they are not always equal. There-

[1] S'il m'a été possible de présenter en anglais les quelques idées qui vont suivre, je le dois à la bienveillante collaboration de M. Leslie Scott, de Liverpool, qui a bien voulu revoir mon manuscrit. Je tiens à lui en exprimer ma vive reconnaissance, en laissant aux lecteurs le soin d'apprécier la compétence et la sagacité de son intervention.—L. F.

fore the system is false. But I do not think there is much chance of its restoration to favour in England, and I need not deal with it further.

The Egyptian system is nothing more than a curiosity—worthy of a country where curiosities abound. In this system, the greater the value of your ship, the greater the damages it must pay: to own first-class ships will merely be to increase your liability. But it is needless seriously to combat this strange fancy.

It remains then simply to compare the rule of division of loss with the proportional rule.

My opinion is that the last system is the only one consistent with justice and equity.

But expediency may be opposed to justice, and I therefore propose, upon the suggestions made to me by my honoured friends Mr. Thos. R. Miller of London, and Mr. Gray Hill of Liverpool, both members of the International Law Association, to show, from my experience at the continental bar, that the rule of apportioning the loss is not only theoretically right, but in practice works easily, effectively, and correctly, to the satisfaction of all concerned.

2. *The theoretical value of the reform.*

Suppose a collision to have just taken place in the Channel between an English steamer and a foreign steamer, and that the damage is £3,000 to the English and £1,000 to the foreign vessel. The foreign vessel, having the English on her starboard side, rashly kept on her course, and, without materially altering either her helm or her speed, ran down the English vessel. Those in charge of the English vessel slackened speed and stopped and reversed, but were too late in performing that necessary manœuvre.

You, sir, are the interested owner of the British ship. You take the best advice you can obtain, and ascertain the following particulars:

1. The foreign vessel belongs to a Dutch company.
2. She is moored at Dover.
3. You are entitled to arrest any other steamer and freight belonging to the same owners, which may be at Le Havre or at Antwerp, or any other French or Belgian port[1].

Here, the contrast between the three systems of dealing with damage where both are to blame becomes apparent. Each of the three above-mentioned facts gives jurisdiction to a different Court,

[1] By arresting a steamer and freight belonging to the same owners you can bring the question of the collision within the cognizance of Belgian and, in my opinion, of French Courts especially if any of the cargo is French owned.

and each Court will decide the case upon a different principle: and it is for you to make your choice. At Rotterdam you will obtain nothing. In London you will obtain, under the rule which divides the loss equally, £1,000[1]. At Antwerp or Le Havre with the proportional law you will recover £2,200, the blame being apportioned as one-fifth to four-fifths[2]. Which do you consider the best rule?

The Dutch costs you £3,000.

The English costs you £2,000.

The Belgian or French costs you £800.

The above figures speak for themselves, and the logical conclusion to be drawn from them is obvious.

Where negligence, or *culpa*, constitutes the cause of action, it stands to reason that liability ought to be measured by the degree of negligence of which the two parties are respectively guilty. In the case supposed your negligence has been slight, and therefore it is only fair that your liability should be small. In fact the case of the owners is analogous to that of the captains. The captain of the foreign ship has been guilty of gross misconduct, your captain of an error of judgment—he was not quite as prompt as he might have been; your captain deserves a reprimand, the other captain dismissal. So, regarding the damage as the penalty for negligence imposed by the Court, it is right that the penalty paid by you should be light, by the foreign owners should be heavy. In other words, the proportional rule is the fair rule.

My experience is that in collision cases the fault is very often more on the one side than the other; but even if such difference of guilt happened but once in twenty cases, the most elementary sense of justice would demand a difference in the treatment of the two parties. This the Courts of Norway, France, Belgium, &c., and now also the Courts of the United States can do, but the English judge cannot. If a pair of scales is the emblem of maritime justice in England they are strange scales, in which the slightest neglect—*minima culpa*—less even than that, a statutory presumption of fault—weighs as many pounds sterling as the grossest misconduct.

The English rule is then unjust. But it is also illogical. It is intelligible that the law should take away all right of recovery when there is common fault; but it is impossible to understand why a law which recognizes the principle of dividing the liability should decide that in every case the division should be by halves. That is purely arbitrary. Either the principle of division is just,

[1] $\frac{3000}{2} - \frac{1000}{2} = \frac{4000}{4} = 1000.$

[2] That is $\frac{4}{5}$ of $(3000 + 1000) - 1000 = \frac{4 \times 4000}{5} - 1000 = 3200 - 1000 = 2200.$

and then it should be complete, that is proportional; or it is unjust, and there should be no division—by halves any more than by quarters.

But not only is the rule unfair and illogical, it is also born of a historical mistake. The practice had its origin in a mediaeval rule, which applied to cases of inscrutable negligence, and not at all to cases where the faults are ascertainable.

The only real objection made to the proportional rule has been this: It is theoretically right, but does it work well? Is it possible to ascertain the degree of fault? Will it not increase litigation? Let the facts answer these doubts.

3. *The Practical Value of the Proportional Rule.*

The law of proportional division of loss rules a tonnage of 3,550,000 tons, and, including the United States, 5,715,000 tons. It is daily applied by minds as different as those of a Frenchman, a Norwegian, a Greek, and a Belgian; and yet no complaint is ever heard that it works unjustly.

I think it may be useful here to add to my own views the opinions of some eminent men in the various countries where the proportional rule is in force. They are: Monsieur de Valroger, ex-president of the Conseil de l'Ordre des Avocats at the Cour de Cassation in France, author of an excellent treatise on maritime law; M. Clunet, editor of the *Journal de Droit International Privé*; M. F. C. Autran, editor of the *Revue Internationale du Droit Maritime*; M. O. Platon, professor of Maritime Law at the University of Christiania; M. Marais, Bâtonnier de l'Ordre des Avocats at the Rouen Court of Appeal; M. Edmond Picard, senator and advocate at the Belgian Cour de Cassation, and chief editor of the *Pandectes Belges*; M. R. S. Gram, Judge at Copenhagen; M. Uppstrom, Judge at Christiania; M. Lagersholm, president of the Swedish Marine Insurance Company. Their answers are, with one hesitating exception, unanimous. The reader will find them at the end of this article.

As far as Belgium is concerned I may say, that not only in my own personal experience, but also in that of my colleagues, before the Antwerp and Brussels Courts, this rule is daily applied without difficulty.

The working of the Rule.

In any discussion upon the working of the rule, two points must be borne in mind. Exactly the same investigation into the circumstances of a case must be made under the proportional rule as in England—neither more nor less. The facts, the responsibility and the damages must be ascertained under both rules. It is only

at this point, where the task of the English judge is ended, that the divergence begins: the French or Belgian judge goes on to decide whether there is a difference in the degree of negligence upon the two parties.

No compulsory apportionment.

No obligation whatever lies upon the French or Belgian judge to find such a difference in the degree of negligence of the two ships, if no such difference exists. If he cannot distinguish between them to his own satisfaction he will divide the damage equally, or if the loss incurred by each interest is proportionally about the same, he will leave the loss where it falls and dismiss both claims. Where equal division of loss fairly meets the facts of the case he applies the English rule, just as he applies the German rule, and admits no claim, where the justice of the case is best so met. But where the Court finds both a rational and a moral difference in the amount of culpability, it is entitled to give effect to that conviction.

No nice calculation.

The system, then, is not an attempt to convert a collision case into a mathematical problem, where every act shall be given its numerical value and the total number of marks obtained by each side added up and compared at the end. It is a question not of algebra, but of common sense.

For instance, one ship is guilty of gross misconduct, the other of a failure to comply with the regulations, which under the circumstances was almost excusable; the former will bear four-fifths of the total damage, and the latter one-fifth. If the difference is less the proportion will be three-fourths to one-fourth. Or if smaller still, the proportion will be two-thirds to one-third. I have never heard of any extraordinary difficulty being felt in the apportionment of the blame in this way. On the other hand I have often been told by judges that it is much easier to make such a comparison than to decide what was the operative cause of the collision, with a view to fixing one ship with the whole responsibility and holding the other blameless.

There is another point of view from which, I think, the difficulty of thus apportioning the blame may seem less. In applying this principle, the Court acts in collision cases exactly as in penal matters, where it fixes the penalty at some point between the maximum and minimum allowed by law, to suit the gravity of the offence.

As mentioned above, the usual fractions are thirds, fourths or fifths. This is also the case in France, in Norway, and in Denmark. The judge does not attempt finer distinctions, unless there are three or four ships concerned; in such a case it may happen, for instance, that one-half of the loss being thrown upon one vessel, all the others

divide the remaining half amongst them, and if, for instance, there are four equally to blame, they will bear one-eighth each. But the general fractions are thirds and fourths. Naturally it may in some cases be difficult to know whether the blame should be measured by one-fourth or one-fifth—it is a matter of appreciation just as in many cases the amount of damages is. But in a large number of collision cases the parts generally played by the respective vessels in the nautical drama make the apportionment of blame very easy.

For instance, by her sole negligence, *A* turns a position of security into one of danger. The danger having been created, *A* either continues in her fault or makes matters still worse by committing another; but *B*, on her side, does not do *all* she might, in order to avoid the final collision. In such a case the creation of the direct danger by *A* will be considered, generally, as a reason for putting a heavier burden of damages upon her owners—it may be two-thirds or three-fourths; and I think this is an accurate and fair estimate of the case.

Or again, one vessel transgresses a rule of the road, and also the rule of slackening speed, and stopping and reversing; whilst the other vessel, which may perhaps have expected to escape by keeping on her course, only transgresses the latter rule. The former vessel is without any doubt the more to blame.

Practical instances of the Proportional Principle.

Instances from the experience of myself or others will still better show the actual working of the rule.

Lights.

Flare-up.

The *Oliva* and *Severin* were navigating at night, at the same speed, in the Scheldt, bound for Antwerp, the former steamer being about 250 yds. ahead. Near the shore-lights of the *Rilland* the *Oliva* slackened and starboarded, without showing a flare-up to the overtaking *Severin*. A collision occurred.

Held, that both were to blame, the *Oliva* for not giving by light or whistle any signal that she was slackening her speed, the *Severin* for not using proper care, as her captain ought to have known that at night it was almost necessary to slacken in the neighbourhood of the *Rilland*. As both vessels seemed equally in the wrong, the damage was divided [1].

[1] Antwerp Commercial Court, May 13, 1890. Jurisp. du Port d'Anvers 1891, p. 192.

Improper Lights.

By article 2 of the Regulations no other than the regulation light shall be carried.

On a dark night a Norwegian brig was run down by a steamer. The brig carried an extraordinarily bright light in her cabin, which was visible at a considerable distance and may have misled the steamer; but the steamer by the exercise of more skill and nerve subsequently might have avoided the collision.

Held, that the brig must pay a part of the damages, but only a very small part, on the ground that the infringement of the regulations was not serious.

Rules of the Road.

Crossing Ships.

The *Sirius* and the *Durley* were crossing steamships. The *Durley* having the *Sirius* on her starboard side did not alter her helm. But the *Sirius* failed to reverse her engines, and at the last moment altered her helm.

Held, that the *Durley* committed the initial and more serious fault, and must answer for four-fifths of the damage [1].

Duty to hold on.

Those who are acquainted with these matters know, that where one of two ships is to keep out of the way, the duty imposed on the other to keep her course is, in some cases, really difficult to perform. In such cases the proportional rule is welcome to an equitable judge.

A fishing-smack, the *Cornélie*, holding on before an approaching steamer, showed some hesitation in keeping her course. But the steamship, which could by an easy manœuvre have avoided the collision, did nothing at all, failing to slacken speed till the last moment; and the smack foundered.

The Court of Appeal was of opinion that there was fault on both sides, but that there was no comparison between the reckless navigation of the steamer and the imperfect compliance with the regulations by the fisherman. Four-fifths of the damage were borne by the steamer [2].

[1] Cour de Bordeaux, July 30, 1888. Revue Int. Droit Mar. IV. p. 260.
[2] Court of Appeal at Brussels, July 6, 1876. Pasicrisie Belge 1877, p. 118.

Starboard side Rule in a Narrow Channel.

A lighter was driving on with the tide at the entrance of Antwerp harbour just at the very moment when steamers were being docked out. A steamer, instead of waiting till the lighter had passed and left more room, went on, and failed to take as closely as possible the starboard side of the channel. A collision occurred.

The lighter was blamed for navigating in a way which at that moment was dangerous, and the captain of the steamer for navigating in mid-channel.

The damage was apportioned by fifths, three-fifths to the lighter, and two-fifths to the steamer. But as the imprudent navigation of the lighter had been noticed by those on the bridge of the steamer, who nevertheless went on, the owners of the steamer, in order to avoid an appeal, agreed to pay three-fifths of the loss; and the matter was settled [1].

Starboard side Rule and Anchored Vessels.

A tug towing three lighters came at night out of the New Docks gate at Antwerp, and took her course in mid-channel. Near the second dockgate the *Strathlyon*, although seeing the tow, came stern first out of the gate, and compelled the tug to port; but soon after porting, the presence of an anchored steamer, the *Saga*, obliged her to starboard. The tow being too long it was impossible for the tug to carry out successfully the complicated course rendered necessary by the manœuvre of the *Strathlyon*, and the last of the lighters collided with the *Saga* and sank.

On the approach of the tow those in charge of the *Saga* did nothing to leave more room. All were clearly to blame, and the proportional rule was a nice method of dividing the liability.

Tug and tow were held in default for their course in mid-channel and for their length. They had to bear six-eighths of the damage; the tug, which, as having the directory power was the more responsible, bore three-eighths, the two uninjured lighters two-eighths, the plaintiff, the sunken lighter one-eighth. The *Saga* and the *Strathlyon* were each held liable for one-eighth, the former for not having slipped her anchor, the latter for coming too hastily out of dock.

The mental operation of the judges was clearly this; the larger part of the blame was on the tug and tow, but blame also attached to the *Saga* and the *Strathlyon*. As between the tug and the tow the more guilty was the tug. Then they sought figures to express

[1] Commercial Court of Antwerp. March 6, 1891.

their opinions. I acted in the case, and may state that the division they made was not seriously criticized.

Rule to slacken speed, stop and reverse.

It may be a nice question to determine exactly when it becomes the bounden duty of the officer in charge to slacken speed or stop and reverse.

The steamer *Baron Osy* was recklessly holding the wrong side of a narrow channel. The *Archimedes*, on the opposite course, was thus in conformity with the regulations on the same side. Noticing that the *Baron Osy* continued in her wrong course, the *Archimedes* stopped.

Held, that she ought to have stopped sooner, on observing the abnormal course of the *Baron Osy*. Nevertheless her owners were only charged with one-fourth of the liability, 'As the blame on her was small in comparison with that of the *Baron Osy*, and as the collision would not have occurred unless the contributory faults of the *Baron Osy* had been first committed.' Such are the terms of the decision [1].

Improper Anchorage.

In the following case (unreported), which I pleaded, the proportional rule was correctly applied to negligence of ships at anchor. Two steamships were at anchor at the mouth of the Scheldt. At night, after the turning of the tide, the anchor of *A* gave way, and drifting with the tide, she came into collision with *B*. Both could have avoided the collision if their watches had been better. But it was equitably decided that the drifting steamer, although not exactly a vessel under way, was the less excusable for not having noticed the fact that she was moving. The total loss was divided by apportioning two-thirds to *A*, and one-third to *B*.

Improper Navigation and Anchorage.

The *Kelly* was preceding the *Eliza Anna* at about 700 yds. distance. The *Kelly* before heading the tide, and without giving any notice of her manœuvre to the *Eliza Anna*, came to an anchor. A collision occurred through the *Kelly* swinging to the tide across the bows of the *Eliza Anna*, who on her side failed to change her helm.

Held, that the *Kelly* was answerable for two-thirds on the ground that her anchoring was dangerous, and that her manœuvre could

[1] Commercial Court of Antwerp, May 12, 1882. Jurisp. du Port d'Anvers 1882, p. 197.

not have been observed by the *Eliza Anna* until a moment just before the collision; but that the *Eliza Anna* contributed to the collision by failing to take immediate measures to avoid it [1].

Tow and Tug. Sheering about.

The *Progrès*, a lighter, was anchored at night at the confluence of the Scheldt and the Rupel, about ten miles from Antwerp. Although the anchorage was illegal and dangerous and no watch was kept, there was room to pass on her right side. A tug, the *Telephoon*, having a long tow of lighters, nevertheless took the narrow and dangerous way on the left side. At the same moment the improperly anchored *Progrès* sheered about, and one of the towed lighters came into collision with the *Telephoon* and was lost.

For the owners of the sunken cargo, I with M. Jules Vraucken obtained a judgment (unreported) saying that all were to blame; the *Progrès* for unsafe anchorage and absence of look-out; the tug for taking without any reason the more dangerous course on the left side of the *Progrès*; the lighter, finally, for not having slipped the tow-rope on seeing the peril. As the Antwerp Court were of opinion that the *Progrès* and the tug *Telephoon* were equally in the wrong and the lighterman less, a proportion was sought which would give expression to that opinion. The loss was accordingly divided by fifths. One-fifth to the lighterman, two-fifths each to the *Telephoon* and the *Progrès*; the cargo-owners obtaining judgment for the whole of their loss.

Experience of British Judges.

A perusal of the above instances in which the proportional rule has been applied will, I think, be sufficient to satisfy the British public that the system works without difficulty, and is easily understood. The learned judges of the Admiralty Division of the High Court are, in my opinion, the most experienced maritime judges of Europe. There is no reason why they should not be able to do what is done by their colleagues in France, Belgium, Norway and Greece.

When division of loss will continue.

In every case where they find in both ships equal negligence and equal responsibility for the accident, the judges will continue the apportionment by halves, which is division of loss. In fact, division of loss is a rough and ready proportional rule, and the only change necessary is to make it more perfect; to have a flexible rule which may be adapted with more accuracy and justice to the various circumstances of each case.

[1] Dec. 1, 1886. Revue Int. Droit Mar. II. p. 531.

Incorrect apportionment of the blame.

There may be occasions when the blame is not correctly apportioned—perfection is not of this world. I have met with such cases, and my experience is this. Even an approximate proportion is more welcome to the parties than a mere division of loss which is no approximation at all. The suggestion of blame at all is generally repelled with energy, but, when once blame is admitted or proved, the proportion fixed by the judges does not give rise to much criticism. The ship which was actually responsible for a quarter of the total damage is clearly better off if it have to bear, say, one-third of the damage than by the rule of division of loss. Where the Court says one-third where it should have been one-fourth, it is a mistake of the Court:—and even the best judge is not beyond the reach of error. But where the judge, although seeing and saying that the faults are not at all equal, is nevertheless compelled to make the burden of damages equal, justice fails.

And justice fails still more when the judge, although seeing negligence which ought not to remain unblamed, cannot or will not keep it in sight because he cannot bring himself to punish a trifling fault with liability for half the total loss. Surely the proportional rule which avoids extremes is the fair one.

Appeals.

On the question of the effects which the proportional rule has upon the frequency of appeals, no unfavourable evidence is forthcoming, either in Belgium, or in any other country where the proportional rule applies. There is no reason to think that the law of apportioning the damage to the fault gives rise to more litigation or appeals on the continent than the rule of division of loss in Great Britain. On the contrary more than one case has been, to my own knowledge, settled after the first trial, simply because it has not been thought worth while to incur the costs and delay of an appeal on a mere fraction of the damages. But where the question at issue is whether a half, or the whole of the damages, or nothing shall be paid, then there is a great temptation to appeal. At any rate, so long as an appeal is allowed by law, it is not possible to regard it as so great an evil that it is worth while having a bad law in order to avoid it.

Authorities for the proportional rule.

Just as on general principles the proportional rule is just, so I think it may now be stated that there is no serious objection of a practical kind to it.

Why then should there continue in force in England a practice which Chief Justice Denman once described as 'an arbitrary provision of the law of nations not dictated by natural justice nor, possibly, quite consistent with it'?

It is solely by the force of custom and tradition that the system has survived. It is the old story told by Bynkershoek.

When that greatest of eminent jurists of last century proposed to his colleagues of the Supreme Court in Holland that they should apportion according to the respective faults the losses caused by a collision where both ships were to blame, the story runs that those learned but tradition-tied men were thunder-struck and unable to bring their minds to entertain the proposal of their chairman. That old traditional thunder still seems to affect the minds of men as it did in that day.

But many also have freed themselves from the fear of it!

Continental Meetings.

On the continent the proportional rule has been adopted by the following important international meetings, though there were some dissentients in favour of the British system :—

In 1885, the Commercial Congress of Antwerp.

In 1888, the Commercial Congress of Brussels.

In 1888, the Meeting of the Institut de Droit International at Lausanne.

In 1892, the Commercial Congress at Genoa.

British Meetings.

But meetings, which have been mainly British, have also voted in favour of the rule : such as—

In 1895, the Brussels Conference of the International Law Association.

In 1896, the Chamber of Shipping of the United Kingdom, in London.

Opinion of British underwriters and owners.

Support has been given to the movement by men whose experience entitles their opinion to great respect, such as the representatives of—

The Liverpool and London Steamship Protection Associations.

The West of England Steamship Owners' Protection and Indemnity Association.

The American Chamber of Commerce of Liverpool.

The Newcastle Protection and Indemnity Association.

The London Steamship Owners' Mutual Insurance Association.

A principle is not established by the number of its adherents; but a presumption is raised in favour of the advocated reform when its adherents are so many and so various. The numerous letters of eminent men printed at the end of this article form a body of authority which is a further, and a very strong argument in favour of the proportional rule.

United States.

To these authorities may be added the most important fact that the proportional rule has recently found its way into the law of the United States.

Where two steamships, the *Victory* and the *Plymothian*, met each other on a bright afternoon in a broad and deep stream with ample sea room for each vessel, and both were on the same side of the

channel, it was held that both were to blame; the *Victory* for keeping obstinately to the left or wrong side, the *Plymothian* for not taking proper precautions in order to avoid collision, when it became plain to those on board her that the starboard side rule was being disregarded by the other vessel.

But the Court held that the *Victory* was grossly in fault, that her course seemed almost wilful, that she was without any doubt the chief cause of the disaster, and under these circumstances held that it would be manifestly inequitable to divide the loss equally. The owners of cargo on the *Plymothian* intervened.

'The rule of division,' said Judge Simonton, 'cannot be said to be inflexible. In the *Max Morris*[1], the question was suggested before the Supreme Court, but it was not necessary to pass upon it. The Court says: "Whether in a case like this (mutual fault) the decree should be exactly for one-half of the damages sustained, or might, in the discretion of the Court, be for a greater or less proportion of such damages, is a question not presented for our determination on this record, and we express no opinion upon it."'

'The application of an equal division of damages,' continues M. Simonton, 'is said to be *rusticum judicium*. . . . That is to say, it is an application of that sense of fair dealing and of justice embedded in our nature, the conclusions of common sense, of a mind *abnormis sapiens*. *If the spirit of the rule be* adopted, and the *liability of each vessel be measured by its degree of fault*, exact justice will be done by applying the stipulated value of the *Victory* ($67·500) to the loss sustained by the cargo on the *Plymothian*, and by requiring the *Plymothian* ($71,000) to make up any deficiency[2].'

This memorable decision marks the introduction of the proportional rule in the law of the United States, and there cannot be a better conclusion to this article than the words of Judge Simonton: 'There are cases in which it would seem to be manifestly inequitable to assess equally the loss. How long will such manifest inequity remain the law of this country?'

But one word more must be said.

It ought to be the common aim of all practical men to have on maritime matters an international law to which all nations shall bind themselves by treaty.

Ships are largely cosmopolitan—made to navigate the whole world, rendering services in the same way to all nations, and whatever be their flag, fighting against the same dangers. Why then should there be differences in the laws which govern them? Why should laws change as they move from port to port?

[1] 137 U.S. 1. 11 Sup Ct. 29.

[2] U.S. App., no. 113, p. 271. May 28, 1895. Before the Chief Justice and Golf and Simonton, Circuit Judges. 68 Fed. Rep. 395.

In regard to collision, salvage, compulsory pilotage, limitation of owner's liability, procedure and jurisdiction, negligence clauses in bills of lading, the priority of damage, and wages-liens, demurrage lien, double insurance, and so on in respect to numerous maritime matters, we live in a chaotic state of law, which allows neither owner, nor underwriter to know beforehand exactly the risks to which he subjects himself.

And who is affected to a larger extent by the many conflicts of laws than English ship-owners, whose ships are arrested in a foreign country and judged there according to different laws?

This should not be so.

As a whole, English maritime law is a plain and reasonable law. There is no doubt to me that in the process of unification of maritime law, the English principles will, to a large extent, become universal principles. But still there are some, which cannot be maintained because equity and reason condemn them.

Among these is the rule of division of loss. As a measure of compromise, which may lead to unification of maritime law, this principle ought to be changed. In doing this, the law of this country will only complete the evolution which she has already begun. When in 1873 she made generally applicable the rule of division of loss[1], she showed that she abandoned the principle of leaving the loss where it falls, and was of opinion that where both were to blame the liability should be divided. To-day it remains to complete this progress by deciding that this division shall be proportional. The loss will continue as before to be divided by moieties where the faults are equal, but when they are manifestly unequal, the judge will take account of the fact in his assessment of the damages.

This example of England coming upon the recent example of the United States will so far tend towards converting to the proportional rule the countries where, till the present time, negligence on both sides has taken away all right to damages. We shall then no longer have the spectacle, so humiliating to reason, of a collision in the North Sea leading to consequences totally different according to the accidental fact of the nationality of the nearest port of refuge.

LOUIS FRANCK
(Advocate at Antwerp, Professor of Maritime Law at the École des Hautes Études at Brussels).

[1] Judicature Act, 1873 (36 & 37 Vic. c. 66, s. 25, s.s. 9) applying the admiralty rule to actions brought at common law.

APPENDIX.

I did not wish to limit this article to the expression of my own views, and I have accordingly addressed myself to several well-known lawyers and experienced men.

The following are the answers I have received :—

[*Translation.*]

DR. OSCAR PLATON (late Judge of the Christiania Court), Professor of Maritime Law at the University of Christiania.

TO MONSIEUR L'AVOCAT LOUIS FRANCK, Antwerp.

Norway. My late colleague in the University of Christiania, M. Fr. Hagerup, now Minister, has handed me your list of questions and asked me to answer them.

I teach Maritime Law in the University. I have besides been for many years a member of the Court of Christiania. Finally I was a member of the Commission which drew up the Maritime Code.

I think, therefore, I may say that I have had some practical experience of the law of which you speak.

The effect of Article 220 of the Maritime Law of July 20, 1893, is not new. The principle had already been introduced in § 80 of the previous law of March 24, 1860. We have therefore had in Norway an experience of more than thirty years of the proportional rule.

As you know, European maritime law has developed in different directions upon this question of making good the loss. In my opinion it is the Laws of Oleron (15) [The Black Book of Admiralty, Sir Travers Twiss, I. p. 109; II. pp. 229, 449 (the article is there numbered 14)], which admitted the principle of division by moieties in those cases where further information cannot be obtained. This rule then passed into various systems of maritime law, and was admitted equally with the rest by the Danish-Norwegian Code of Christian V (1683 for Denmark, 1687 for Norway), Book IV of which contained the Maritime Law.

The Norwegian Code of 1860 had the merit of breaking with this system. The text of Article 80 is as follows:

'If the collision has been brought about neither by wrongful act (*dolus*) nor by negligence, there is no occasion for indemnification, but each vessel bears its own loss.

'If faults have been committed on board both vessels, the judges must determine according to the character of the respective faults, *and according to the other circumstances*, if an indemnity is due from one party to the other, and in what proportion it is due.'

On comparing this text with that of Article 220 of the new Code, you will observe that the two texts agree, except that the words '*and according to the other circumstances*' have been omitted. It appeared that these words from some reminiscence of the old law, and especially the Laws of Oleron, gave rise to this objection that account was taken not only of the gravity of the fault, but of the value and size of the vessels and their cargoes. Our meaning was to prevent this interpretation. There was no occasion to take

account of anything but the faults committed, in such a way as to give compensation for the whole or a part of the damage.

The Swedish law of 1864, § 172, still prescribed, as a general principle, the old division by moieties, although it was permitted to the judges to divide the loss otherwise.

The Danish project of law of 1882, § 296, had adopted the same system.

There was in these two cases, therefore, an attempt at compromise between the old ideas and the new Norwegian principle.

But the Norwegian members of the Commission were unanimous not to accept this compromise, which was for them a retrograde movement. They gained the day. In consequence the new law, § 220, says:

'1. If the captain or a member of the crew is in fault, the whole loss falls on him.

'2. If the collision is the result of inevitable accident (*casus*),

'3. Or if it cannot be established that a fault has been committed on board the one or the other vessel, each vessel bears its own loss.

'4. If there is fault on both sides, the judges decide, according to the nature of the faults committed on each side, whether there is occasion, and in what measure, to make damages payable, or whether each vessel shall bear its loss.'

If Norwegians set such store by the principle of their law, it is because they had had experience of it and were satisfied.

It is remarkable that the Code of Christian V had been in force till 1861, so that four members of the Commission had known the old law in operation: they could therefore appreciate the two laws and speak from experience. I myself was still, in 1861, seated on a bench at school, and therefore had no experience of the old law. But Norwegians were strongly of opinion that they wished to preserve the principle of the law of 1860.

Therefore when you ask me whether our proportional principle works to the unanimous satisfaction of the parties interested and of lawyers, I take the liberty of answering categorically, *Yes*.

I may add that this rule does not give rise to litigation or other causes of objection. Actions are brought under the new law as under the old—but no more.

The proportional rule is, in the eyes of lawyers and clients in Norway, preferable to other systems.

Finally, I may say that the proportions in my experience are generally $\frac{1}{2}$, $\frac{1}{3}$, $\frac{1}{4}$. I have never seen cases of fractions so small as $\frac{1}{10}$.

The Maritime Tribunal of First Instance is composed of a judge, assisted by two men of nautical experience. In collision cases these assessors are old ship-captains. From this tribunal an appeal lies direct to the Supreme Court. Well, I may give my testimony that never, even amongst the profane, have I seen any inclination, in a case where the evidence leaves the matter in doubt, to take refuge in the *judicium rusticum*—the simple division of loss. The case is, on the contrary, estimated coolly and seriously. I remember a case where the Tribunal of First Instance had intimated that the evidence was conclusive that one vessel alone was to blame, and had condemned one of the captains to pay the whole. But the Supreme Court held that the evidence of blame was not conclusive, and each party had to bear his own loss.

Yours, &c.,

(*Signed*) Dr. Oscar Platon.

[*Translation.*]

M. DE VALROGER, Avocat de la Cour de Cassation in France, late Président de l'Ordre.

PARIS, *Jan.* 17, 1896.

France. Cour de Cassation.

MY DEAR SIR AND COLLEAGUE,

I hasten to thank you for your very interesting pamphlet on the conflict of laws in the matter of collisions.

In case of collision due to common negligence, justice clearly requires that the liability between the two ships should be fixed proportionately to the gravity of the fault.

But the difficulty is to weigh the responsibility of each. There are cases where the judge considers he can do it; leave, for example, $\frac{2}{3}$ upon the one, and $\frac{1}{3}$ only upon the other (Dall. 81. 1. 458). But very often the judge limits himself, in case of common fault, either to dividing the liability by moieties (Dall. 87. 1. 119), or to leaving each to bear his own loss (Dall. 81. 1. 458).

Beyond this, the division that may be made as between the vessels does not seem to me applicable to shippers, in regard to whom the collision is a single indivisible fact; and I think that the shippers whose goods have perished ought always to have a right to sue the captains in fault, jointly and severally (*action solidaire*) saving their remedies against each other. This is what I have pointed out in my treatise on Maritime Law (No. 2115, 2118), and this is what was decided by the Court of Bordeaux, July 30, 1888 (Rev. Inter. de Droit Marit. IV. p. 259).

Yours, &c.,

(*Signed*) L. DE VALROGER.

O. MARAIS, late Bâtonnier de l'Ordre des Avocats at the Court of Appeal of Rouen.

ROUEN, *Feb.* 19, 1896.

M. Marais writes:—

1. The rule of division of loss proportionally to the degree of the respective faults is frequently applied in our tribunals. It is in accord with the general principles of the law (art. 1382), since it measures exactly the amount of damages by the extent of the fault. It obeys also the precepts of natural justice. I never heard anybody on the question of principle criticize this rule, which I consider, for my part, to have passed into our judicial tradition to such an extent that any other rule would appear to us unjust.

2. Appeals in cases of collision have never, so to speak, as an object the criticism of the division in itself. Parties always take their stand on the ground of entire freedom from liability.

The apportionment is usually made by moieties.

[*Translation.*]

F. C. AUTRAN, Avocat, Editor of the Revue Internationale de Droit Maritime.

MARSEILLES, *Jan.* 27, 1896.

Marseilles.

MY DEAR COLLEAGUE,

My recent absence in Paris is the cause of my delay in answering you. The French rule in cases of collision due to a common fault has *never* given

rise, so far as I know, from the point of view of principle, *to any objections.* This rule does not give rise to more appeals than other principles of law. It is impossible to state exactly the fractions in which the liability is allocated by the decisions, for the very reason of their diversity.

Yours, &c.,

(*Signed*) F. C. AUTRAN.

[*Translation.*]

M. EDMOND PICARD, Avocat à la Cour de Cassation in Belgium; Senator; Head Editor of the Law Encyclopaedia, 'Les Pandectes Belges.'

1. The rule of dividing the loss proportionately to the degree of the respective faults is applied in Belgium to collisions, and is so applied to the general satisfaction of both lawyers and the parties interested. It is considered *a just and reasonable rule.*

2. I have not observed that it gives rise to any cause for objection.

3. The majority of decisions adopt such fractions as $\frac{1}{2}$, $\frac{1}{3}$, $\frac{1}{4}$, $\frac{1}{6}$; seldom fractions so small as $\frac{1}{10}$ or $\frac{1}{20}$.

4. This system seems to me preferable both to the Anglo-American and to the Dutch-German systems.

(*Signed*) EDMOND PICARD.

[*Translation.*]

M. JACQUES LANGLOIS, Member of the Royal Commission on the Regulations for the Prevention of Collisions in the Scheldt.

DEAR SIR,

With reference to your queries, there is no doubt, in my opinion, that the division of the liability in collision cases ought to be in proportion to the fault from which the liability arises; and that no justification for any other division can be found except in the difficulty which a judge, who finds both to blame, is supposed to have in estimating fairly the degree of fault on each side; but this difficulty is purely imaginary.

When the case is such that it is impossible or difficult to decide that one vessel is more in fault than the other, the judge must find each vessel equally liable, and condemn each one to pay an equal proportion of the damage incurred; but the fact that both vessels are found to blame should not be taken as implying that both are equally in fault, as is the practice in England.

In some countries the law is even worse, as applied to collision cases, viz. that when both vessels are adjudged to blame, each bears her own loss, whatever that may be.

In Belgium the division of the loss is made according to the estimate formed by the courts of the blame which they attribute to each vessel. This is, as a rule, by fourths, sometimes by thirds. The Belgian rule seems the most equitable, but it does not prevent the inevitable criticism of parties interested.

I am of opinion that in order to prevent unnecessary litigation on the chance of obtaining a better judgment in one country than it is possible to

obtain in another, an international agreement on the above principles of law and the apportionment of the damage is urgently required.

Yours truly,

(*Signed*) JACQUES LANGLOIS.

Note.—M. V. Uppstrom, Magistrat de la Cour de Stockholm, and M. Lagerholm, Directeur de la Société d'Assurances Maritimes Suédoise, write that the proportional rule is incorporated in their code, but is not binding upon the judge. This rule is an innovation which dates from four years ago. Up to the present time it does not seem that it has been applied in practice by the High Court. 'In my belief,' says M. Lagerholm, 'public opinion in this country still clings to the old rule (by which each bore his own loss); and as to the courts, it is well known what resistance they display when it is proposed to extend their investigations. To tell the truth, collision cases present very great difficulties for them; the most scrupulous inquiry into the faults which have caused the collision does not prevent the division of the loss from being more or less arbitrary—a thing that we detest.' Monsieur Uppstrom also thinks that the future of the proportional rule in Sweden is doubtful.

We have naturally thought it best to add these less favourable views, but the reader will notice that in Sweden the reform dates from only four years ago, and that they have had no practical experience of it.—L. F.

The Judge, R. S. GRAM, Copenhagen.

COPENHAGEN, *March* 16, 1896.

DEAR SIR,

Ad the first question in your letter of the 7th inst.:

The rule in § 220 is considered very good and just.

Ad the second and the third question—Fractions of apportionment and instances:

You must remember that my native country is very little, and the law not very old. Thus it may be explained that only a few cases which have bearing on the said questions are to be found in our Law Reports, viz.:

1. A judgment of our 'Höjesteret' (Supreme Court of Judicature), delivered May 31, 1895. Stated that both ships had committed mistakes, and had to pay each half the *total* loss.

2. A judgment of our 'Si-oz Handelsret' (our Court of Admiralty) at Copenhagen, delivered July 3, 1895. The total loss fixed at 94,100 kroner (Danish coinage). One ship sentenced to pay 52,500 kr. of the aforesaid sum, and the other sentenced to pay 41,600 kr.

3. A judgment of the same Court, delivered August 14, 1895. Stated that the two ships had to pay each half the *total* loss.

Yours very sincerely,

R. S. GRAM.

THE NATIONALITY OF CHILDREN OF A NATURALIZED BRITISH SUBJECT BORN ABROAD AFTER THE NATURALIZATION.

THE Naturalization Act of 1870, sec. x, subs. 5, provides that 'where the father . . . has obtained a certificate of naturalization in the United Kingdom, any child of such father . . . *who during infancy has become resident with such father* . . . in any part of the United Kingdom, shall be deemed to be a naturalized British subject.'

Does the restriction conveyed in this wording apply to children born after, as well as to those born before, the naturalization?

The late Mr. Hall in his treatise on the 'Foreign powers and jurisdiction of the British Crown[1],' the most recent commentary on the nationality laws known to me, says on the point in question:

'The Act is silent as to children, whether born before or after naturalization, who are not, or at least have not been, resident with the father or mother in the United Kingdom. It is to be presumed that they remain aliens. In the case of children of a father or mother residing in the United Kingdom, who have been born abroad before naturalization of the parent, this may not be unreasonable; if a father has not chosen to have his children to live with him during a sufficient part of the five years' residence which necessarily precedes British naturalization, it would in the majority of instances be fair to assume that he does not wish them to follow his change of nationality. But when children are born after naturalization, there are many probable circumstances in which an exception to this effect would be manifestly unfair.'

'It would almost seem,' he further observes, 'as if by a reaction of timidity from the anterior habit of casting too wide the net of British nationality, the framers of the Act had been not disinclined in this, as in other directions, to relieve the British Crown to as large an extent as possible from the burdensome duty of protection.'

In short, according to Mr. Hall, the restriction applies to both, and the child born after the naturalization is an alien, unless it become resident during infancy with the parent in the United Kingdom.

There is no reported decision on the subject.

The point is interesting in itself, and is a serious one for naturalized fathers who, owing to foreign connexions which make

[1] Oxford, 1894, p. 27.

them valuable continental agents, are employed by British houses out of this country.

The Act assumes that the naturalized alien will reside after naturalization in the United Kingdom, and under sec. 7 the applicant has to produce evidence of intention so to reside to the satisfaction of the Secretary of State. This would rather indicate that the restriction of the Act as to infant children was not meant to apply to children born after the date of the naturalization.

The question, however, would not be solved by showing that the Naturalization Act, 1870, only dealt with children born before the naturalization.

By English common law persons born in the United Kingdom alone are British subjects. It is by virtue of certain Acts of Parliament that British nationality is extended to children and grandchildren of natural-born British subjects.

4 Geo. II, c. 21 enacts that 'children . . . born out of the ligeance . . . of the Crown of England . . . whose fathers shall be natural-born subjects of the Crown of England at the time of the birth of such children respectively, shall be . . . taken to be . . . natural-born subjects of . . . Great Britain,' &c.

Are the children of naturalized British subjects in the position of those 'whose fathers shall be natural-born subjects of the Crown of England'?

An alien to whom a certificate of naturalization is granted is entitled to all political and other rights, powers and privileges, and is subject to all obligations 'to which a natural-born British subject is entitled or subject[1].'

There are only two qualifications to this assimilation, viz. that when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, he is not to be deemed a British subject, and that nothing in the Act qualifies him to be the owner of a British ship.

Otherwise, then, a naturalized British subject is assimilated entirely to a British subject, for he cannot as such be invested with more than *all* the political and other rights, powers, privileges, and obligations of a natural-born British subject.

Is the benefit derived from the Act of 4 Geo. II, c. 21 the right of a natural-born British subject? It is certain that it rests with

[1] An alien to whom a certificate of naturalization is granted shall in the United Kingdom be entitled to all political and other rights, powers, and privileges, and be subject to all obligations, to which a natural-born British subject is entitled or subject in the United Kingdom, with this qualification, that he shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty to that effect. Naturalization Act, 1870, sec. vii, subs. 3.

the parents and not with the child to determine where it shall be born, and that the possession of that discretion is a right; but on the other hand there is the decision in *Fitch* v. *Weber* (6 Hare 51), according to which the privileges which this statute confers are privileges of the child.

It is surely desirable, in order to prevent hardship and disappointment to those concerned, that the Home Office warn naturalized British subjects that their children, unless born on British soil, will be British subjects only in the event of their becoming resident in Great Britain during infancy with the naturalized parent, and explain what term of residence is considered sufficient.

THOMAS BARCLAY.

[As to the operation of the earlier Acts, cp. *De Geer* v. *Stone*, (1882) 22 Ch. D. 243.—ED.]

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

Tribal Law in the Punjab, so far as it relates to right in ancestral land. By CHARLES ARTHUR ROE, Senior Judge of the Chief Court of the Punjab, and H. A. B. RATTIGAN. Lahore: Civil and Military Gazette Press. 1895. La. 8vo. x and 150 pp.

INTIMATE friends of the learned judge, to whom we owe this valuable and interesting contribution to the evidence illustrating the primaeval origin of our land laws, and those probably of all nations of Indo-European origin, are aware that the leisure hours of many years have been spent in collecting the materials out of which it has been put together. He has been ably assisted by Mr. Rattigan, a son of Sir William Rattigan; but the learned judge is constituted the mouthpiece, and the book is written in the first person. He refers in the preface, in terms of high appreciation, to the uncompleted work of Mr. C. L. Tupper, of the Indian Civil Service, upon Customary Law; and the bearing of this subject upon the historical questions to which we have referred will appear from a passage in Chapter I, in which Mr. Roe prefers the conclusions of Mr. Tupper to those of Sir Henry Maine. 'In his note,' he says, 'on the Settlement Report of the Dera Gházi Khán District, Mr. Tupper has explained the various ways in which property in land has there originated. He shows that, whilst no doubt in many instances individuals have acquired their rights by settling on and reclaiming waste lands by their own exertions, the chief origin of titles has been tribal distribution. In the first chapter of the second volume of his work on Customary Law, Mr. Tupper deals with the subject at greater length and in a more general manner, criticizing Sir Henry Maine's theory that the order of development has been the Family, the House, the Tribe; he expresses the most decided opinion that the order should be reversed, and that, at least as regards proprietary right, it has been the Tribe, the House, the Family. I will not attempt to express any opinion except as regards the Punjab, and here I have no doubt whatever that Mr. Tupper is right.' And as the gradual differentiation of septs and tribes leads to variety in their several applications of a custom which may in its origin have been uniform, so we arrive at those different customs which are embodied in the Riwáj-i-ams, or records of tribal customs, prepared by the Settlement officers during the progress of the settlement of the district, which serve a kind of double purpose, partly that of a Domesday Book and partly that of a collection of institutes of the law. Very interesting is it to note the influence of the decisions of European judges, in modifying harsh or otherwise objectionable features, harmonizing differences, and filling up gaps and *lacunae*. Chapters II and III of the work, which contain an examination in detail of the evidence afforded by these records of the customs, and by the decided cases in the Courts, of the development of various points of tribal

law, are of a highly practical character, and are intended specially for the assistance of the Courts and legal practitioners in the Punjab. And though the details of this investigation are too technical to be interesting to English lawyers, yet the general conclusions set forth in Chapter I should be of high interest to all Englishmen. There we find a general sketch of the Punjab and its tribes; their origin (pars. 1–9); references to and criticisms of Sir Henry Maine's opinion as to the general order of social organization, which has above been briefly adverted to; a description of village communities and their organization (pars. 10–12); a view of the inapplicability of Muhammadan law to these (pars. 13–15); an account of the contrast between the primitive and the modern state (par. 16); an inquiry into the origin and nature of customary law generally, of which the conclusions differ rather widely from those of Sir Henry Maine (pars. 19–21). The view of the learned authors is, that the fundamental principles of the Punjab Tribal Law are to be found in strict succession among the *agnati*, and the consequent restrictions upon the powers of the owner of the estate for the time being (pars. 22–24). The next ten paragraphs deal with the principal points on which these restrictions operate. They are followed by further discussion of general principles and the causes which have influenced the growth of customary law, both in the Punjab and in other countries, for example, the effect of marriage customs, and of the interference and control exercised by the British Courts and officials. It is not possible within the limits open to us to discuss the work further; and we can only commend it, and particularly Chapter I, to the perusal of our readers.

H. W. Challis.

Das System des Völkerrechts entwickelt aus den völkerrechtlichen Begriffen. Von Dr. Paul Heilborn. Berlin: T. Springer. 1896. 8vo. iv and 417 pp.

Defects of method have undoubtedly impaired the value of many a treatise on International Law. This is especially the case with the well-known work of Wheaton, following as it does, though imperfectly, the in themselves misleading divisions of Klüber. What may be called a 'methodus recepta' may indeed be said now to exist, derived in the main from the Roman law distinction between *personae*, *res* and *actiones*; but departures from it are of constant occurrence, as in the work of Professor F. de Martens, and in the writings of many of the younger Italians. The labour, critical and constructive, which Dr. Heilborn has bestowed upon the 'System of International Law' is therefore by no means superfluous; and, although his inquiries have largely resulted in the re-affirmation of established classifications, he has certainly succeeded in throwing a new light, here and there, upon the essential character of certain of the conceptions which go to the building up of the science. Dissatisfied with existing systems, he sets to work to criticize his predecessors, and to re-examine the materials with which he has to deal.

The first part of his book is accordingly devoted to the subjects and objects of International Law; and more especially to human beings, territory, and ships. While admitting that states alone are international persons, Dr. Heilborn thinks it necessary to give some space to individuals, both as such, and as citizens. Here he is led to say something about slavery, expatriation, sovereigns and other state officials. He holds that the Pope, though without international personality, is an object of Inter-

national Law, inasmuch as all states are interested in the recognition by Italy of his inviolability. In the controversy whether the state is 'Herr des Gebiets,' or merely, as Fricker maintains, 'Herr innerhalb des Gebiets,' in other words, whether the right over territory is one of 'Dominium' or one of 'Imperium,' the author inclines to the former view. He assimilates coast-waters, for most purposes, to territory, properly so called. Ships are treated as exceptions to the rule that 'things have no nationality,' but they are not 'floating territory.'

The second portion of the book investigates and classifies the rights inherent in the subjects, and exercisable over the objects, which have been previously described. Of the usual list of 'Grundrechte,' Dr. Heilborn recognizes only the right which every state has to the protection of its personality (Selbsterhaltung); denying, for instance, the existence of a 'right of legation,' and justly observing that the so-called 'right of equality' is only a logical consequence of the possession of sovereignty. He adopts the division of rights into those 'gegen Jedermann' and those 'gegen einzelne, bestimmte Personen'; deriving most of the latter from treaty or from international wrong-doing. The second portion of the work ends with a chapter upon 'self-help,' including war, reprisals, and neutrality. He points out that International Law has nothing to do with the justice of a war, but regards only its conformity to accepted rules. As to its essential character, he considers the respective views of those who lay stress upon its being an un-peaceful condition, who regard it as a department of the law of international intercourse, and who describe it as a procedure for the maintenance of legal rights. According to his own view, war is a proceeding for the protection of national interests, whether they be, or be not, internationally legitimate. A war between two states is, with reference to other states, 'res inter alios acta.' How then, he asks, does the circumstance that a given state stands aside during a war between its neighbours impose upon it the burdensome duties of neutrality? These are undertaken, he shows, in obedience to no ethical instincts, but from a selfish desire not to be attacked by one or other of the belligerents. For the attainment of this end, the non-belligerent state, which, as such, is subject to none of the legal responsibilities which are involved in 'neutrality,' deliberately undertakes them and does so usually by a formal declaration. Each of the belligerents gains a corresponding benefit, by knowing that he has a possible enemy the less. One does not quite see why Dr. Heilborn should suppose that so obvious an account of the origin of neutrality is likely to startle his readers.

In the third part of the book the author classifies the materials which he has previously submitted to a searching examination. His 'System' is as follows: after an 'Introduction' dealing with the nature, sources, history, literature, and sphere of International Law, he would deal, in a 'General Part,' with the character and varieties of states, their origin and extinction, their organs and representatives; also with the objects of the science, and with International Acts (Rechtsgeschäfte). The 'Particular Part,' under 'absolute legal relations,' would treat of territory, of individuals as citizens, aliens, and office-holders, and of shipping: under 'Obligations,' after an explanation of the characteristics of obligations generally, we should get an account of those which arise *ex delicto* and *ex aliis causarum figuris* as well as of those arising from treaty. Finally, under 'Self-help,' places are assigned to reprisals and similar semi-hostile acts, to the conduct of warfare, and to the relations of belligerents and neutrals. The 'System,' it will be observed, is a mere skeleton; departing but slightly from the

distribution of the subject to be met with in most modern text-books. The originality of Dr. Heilborn's treatment lies not so much in his table-of-contents of the science as in his critical discussion of its topics in detail. He is widely read in the literature of the subject, and has bestowed much independent thought upon matters which have long suffered from conventional handling.

T. E. H.

The Principles of International Law. By T. J. Lawrence, Rector of Girton and Lecturer in Downing College, Cambridge; Associate of the Institute of International Law; lately University Extension Professor of History and International Law in the University of Chicago, U.S.A.; sometime deputy Professor of International Law in the University of Cambridge, and Lecturer in Maritime Law at the Royal Naval College, Greenwich. London and New York: Macmillan & Co. 1895. 8vo. xxi and 645 pp.

It is not only from the respect due to a title-page that we have set out Dr. Lawrence's titles in full, but also to show how large an experience he has had in teaching his subject, both in England and in the United States. This would alone suffice to claim attention for anything he writes on it, especially of an educational character, as we consider the present book to be. Nor, in spite of its name, is it less concerned with the philosophy of international law than with its substance; it distinctly aims at being a full treatise on the subject, yet it is not so full as Calvo or Phillimore, Hall or Twiss; and there is about it a something, more easily recognized than described, which points it out as being addressed more to the student than to the man of affairs. We take it as containing all that in the judgment of its author—and it is valuable to have on such a point the judgment of so experienced an authority—ought to be known or can well be known about the subject by an undergraduate taking it up as a distinct branch of study, though among others, as is done for the Law Tripos at Cambridge, and this in the way in which such an undergraduate should know it.

With regard to the principles, properly so called, we are glad to see Dr. Lawrence rejecting Austin's definition of law, as being too exclusively based on that aspect of it in which it may be considered as the command of a superior. He adopts the point of view of Hooker, who prefers to 'term any rule or canon whereby actions are framed a law' (p. 14). Dealing with the old difficulty as to the respective parts to be assigned in international law to reason and custom, or, as he calls them, ethical and historical considerations, Dr. Lawrence pronounces 'that the historical method is the correct one,' and seems in his general theory to limit the function of ethical considerations to projects of improvement or the choice between conflicting usages, the usage, however, which in the latter case is chosen, not being deemed law till it has become clear and uniform (pp. 20–24). And in details he carries out this theory with a fidelity perhaps unusual, both against new views and in favour of them, declining to state the new as law before a clear and uniform custom can be shown for it, and equally avoiding a positive declaration of the old as law when a difference has begun to arise. As an example of the latter kind, we may quote this passage: 'When a large navigable river runs in its entire course through the territory of one state, the right of exclusion' of foreign navigation from it '*probably* still remains.' The italics are ours (p. 189).

Our author's residence in the United States has given a character to his book which may be noticed in more than one place. Thus we have an interesting section on the position of the United States in America, which Dr. Lawrence appears to regard as comparable in substance to that of the Great Powers in Europe, though differently exercised in form, the machinery of conferences and congresses being inapplicable to the action of a single state (pp. 247–251). And he seems to adhere, though with hesitation, to the American decisions by which, during the civil war, the doctrine of continuous voyages was applied to the breach of blockade, though general opinion on the European continent would not extend it beyond the carriage of contraband, and what is probably a majority of English opinion rejects both applications of the doctrine (pp. 594–8).

We could wish that at pp. 490 and 493 Dr. Lawrence had not spoken of the 'neutralization' of the Suez Canal without cautioning his readers that the term is in that case used in a false sense, the ships of war of belligerents being allowed to pass through the Canal, while the forces of belligerents cannot pass through neutral territory. The careful reader will find the truth about this at p. 181, but it should have been mentioned again in the passages referred to, which occur in a section having for its marginal note 'instances of true neutralization examined.' We are aware that, in speaking of the arrangement made about the Canal as neutralization, our author is only following a general, and even an official, practice; but it is one against which we take every opportunity of protesting. Not long ago we found a leading statesman under the impression that England might safely withdraw from the Mediterranean, because the 'neutralization' of the Suez Canal would prevent an enemy from using it as the shortest passage to India.

In conclusion, we have found the book suggestive, the author's caution in laying down law being accompanied by much fertility in pointing out relevant considerations on many questions.

J. W.

Elements of the Law of Contracts. By Edward Avery Harriman. Boston, Mass.: Little, Brown & Co. 1896. 12mo. xli and 342 pp.

Mr. Harriman is still young, and the fact that a young man can produce a book so mature in form and workmanship as this bears the strongest witness to the superiority of the training given in the leading American law schools over the halting and feeble scheme which goes by the name of 'legal education' in the Inns of Court. The book is ingenious and original too, and that is Mr. Harriman's own merit. But let no one say that a good man will write a good book, training or no training. Great ability or great individual industry may overcome the drawbacks of defective training or no training at all; but this will not prevent the skilled workman who has served a proper apprenticeship from being known in his work. We do not hesitate to say that it would be impossible, under the present conditions, for work up to the level here maintained to be turned out by an English barrister of Mr. Harriman's standing. Whatever one may think of the author's innovations in doctrine or arrangement, this is a thoroughly workmanlike and finished performance.

One great innovation is made by Mr. Harriman in his exposition of general principles. Instead of regarding consent as a fundamental notion, he puts it in a secondary place; thinking, it would seem, that the supposed

primary importance of consent is a figment of Romanizing scholars. There is some little mistake here. Mr. Harriman can easily assure himself from the Institutes that, historically speaking, Roman law is as innocent as our own of any general theory of agreement or consent, as little capable of affording, on the face of it, any scientific or rational analysis of contract. Different conditions are necessary and sufficient to establish a cause of action upon different kinds of contracts. In only one group, the 'consensual' contracts, do we hear of *consensus*, in express terms, at all. The theory of *pactum* and *conventio*, like our own modern doctrines of offer, revocation, acceptance, and consideration, was a relatively modern scientific development, largely independent of the historical forms of action, and founded on the general facts of human nature and business, which were not essentially different under the Antonines at Rome from what they now are in London or New York. Still more is this the case with the 'modern Roman law' of the great Continental jurists. When I said last year, in words that Mr. Harriman does me the honour to quote, that we must seek a genuine philosophy of the common law, I did not mean that we are to reject out of hand all ideas that cannot prove a pure Germanic ancestry. But is it really so un-Germanic to think of agreement as the essence of contract? The *fides facta* which crops up all over Europe in the middle ages assuredly had roots in Germanic as well as Romanic custom, while on the other hand it is certain that early Germanic law did not enforce gratuitous promises even if they were formally made. Our ancestors did not wait for professors of *Pandektenrecht* to tell them that it takes two to make a bargain.

Hence Mr. Harriman's view, that the obligation of contract is an obligation both created and defined by the will of the party bound, and is essentially nothing more, has no particular historical support for its logical neatness. Turning to our law as it stands, what compels us to say that a merely one-sided undertaking, 'unifactoral obligation,' as Mr. Harriman calls it, is recognized? Practically, a single decision of the House of Lords, *Xenos* v. *Wickham*, L. R. 2 H. L. 296. But, after all, does it? Writers on this matter, including myself, have perhaps been in too much haste to think this a necessary conclusion. In *Xenos* v. *Wickham* there was no doubt that the parties had really agreed on the terms of the insurance. But, by reason of the revenue laws, the policy under seal was the only available record of the agreement. The question was whether it was to be deprived of effect because it had not been manually delivered by the insurer to the assured or his agent. The minority of the judges consulted (Willes and Montague Smith JJ.) dissented from the view of the majority, not because they thought the deed not sufficiently delivered, but because they thought the agreement was not in fact complete. It is far from clear that the House of Lords intended to lay down, or that the *ratio decidendi* does lay down, any such rule of law as that a promise made by deed is binding without regard to the promisee's assent or intention. I assume, as Mr. Harriman says nothing to the contrary, that the authority of *Xenos* v. *Wickham*, for whatever it does really decide, is generally received in the United States, otherwise there might be questionings and reservations on that point.

It remains true, certainly, that the word 'contract' is specially associated in our sixteenth-century books with the action of Debt, and that this action was historically and formally analogous to the real actions and had nothing to do with promises. But, since Assumpsit had for almost all practical purposes supplanted Debt before Blackstone's time, are we now to force our whole doctrine of simple contracts back into an archaic mould which our great-grandfathers had already broken? And then, one is tempted to

ask, if consent is a merely secondary element, whence are we to derive any rational guiding principle for the construction of contracts?

As to the earlier authorities referred to in *Xenos* v. *Wickham*, it is no doubt the law that when a party has declared himself bound in the solemn form of a deed, he or his representatives cannot be heard (apart from questions of fraud or the like) to deny that any of the ordinary conditions of liability existed. This can throw no light on the general analysis of such conditions. If the history of the Common Law is to be consulted as a guide to its actual or possible philosophy, a deed is not so much an operative as a witnessing instrument. It was conceived as a sure proof of rights, not as a means of inventing new kinds of rights. Hence the current medieval use of the past tense in such forms as 'sciatis me dedisse et concessisse.' The feoffment is the best, as it is the most familiar illustration. As the charter of feoffment was the authentic record of a conveyance, the covenant under seal became the authentic record of a contract. Whether the form of the record is complete, and how far the record is conclusive, are wholly different questions from the nature of the matters recorded.

There are other novel points of arrangement, such as dealing with impossible agreements under the head of Construction, on which I should be more disposed to agree with Mr. Harriman. But I must forbear from any more comment at present. I will only repeat that the American students who use this book will have a book which they can trust for the actual statement of the law, and which on matters of principle will make them think. F. P.

A Digest of the Law of Agency. By William Bowstead. London: Sweet & Maxwell, Lim. 1896. 8vo. xxxvii and 394 pp. (14*s.*)

The author of this work has adopted the method so effectively employed in the Digests of Sir James Stephen and Mr. Chalmers, of reducing the branch of law with which he deals to a series of abstract propositions, logically arranged under headings and articles, each of which is illustrated by the decided cases whose principles it embodies.

The work has been carefully done. We have tested the text, the cases cited, and the index, and have in each case found a clear and correct statement of the point or of the authorities for which we sought. The style is concise, and the contents are free from anything superfluous or redundant. The author does not shrink from handling his authorities somewhat critically, as when he questions the present authority of *Armstrong* v. *Stokes* (p. 234), or the fairness of the logical application of the doctrine of ratification in *Bolton Partners* v. *Lambert* (p. 41). At the same time he is most guarded and precise in stating the exact gist of the authorities he cites. The Digest will be an useful addition to any law library, and will be especially serviceable to practitioners who have to advise mercantile clients or to conduct their litigation, as well as to students, such as candidates for the Bar Final Examination and for the Consular Service, who have occasion to make the law of agency a subject of special study. S. H. L.

The Law and Custom of the Constitution. Part II. The Crown. By Sir William R. Anson. Second Edition. Oxford: Clarendon Press. 1896. 8vo. xxiv and 517 pp.

'"On all great subjects," says Mr. Mill, "much remains to be said," and of none is this more true than of the English Constitution.'

This is the sentence which opens Bagehot's 'English Constitution,' and the thirty years which have elapsed since the publication of his incomparable work have amply confirmed the truth of his remark. When he wrote, the literature which had accumulated upon his topic was already huge, but has since that time increased both in bulk and, what is of far more consequence, in value. Writers, among whom Sir William Anson occupies a leading position, have explored the constitution from a new point of view. They have considered not so much its conventional or its historical as its legal character. As things now stand, Anson's Law and Custom of the Constitution has been developed into a complete guide to the mass of law which forms the basis of our English constitutional arrangements. The word 'developed' is here used of set purpose. Sir William Anson's book was from the beginning a thoroughly good piece of workmanship, but by his constant endeavours to explore more and more minutely in each edition the whole field of constitutional law, he has now made it one of the best constitutional treatises in existence. This is not the occasion to examine the merits of his work as a whole. Their nature may be best understood if we take a mere fragment of a single chapter and consider what our author has in his second and last edition of Part II of his work to tell us about the Channel Islands. Most Englishmen, we suspect, have a hazy idea that these Islands form part of the United Kingdom. No notion is of course more erroneous. It will be completely dispelled by reading six or seven of Anson's pages. The reader will there learn that the Channel Islands are the part of the Duchy of Normandy which is retained by the English Crown; that they are governed by laws essentially different from the laws of England; that they possess a constitution, and a very peculiar constitution, of their own; and that they claim a certain independence of the Imperial Parliament. That the claim should ever seriously be made good against the will of Parliament is impossible, but that Parliament should ever wish in fact to invade the theoretical independence of the Islands is happily in the highest degree improbable. The truth is that the Channel Islands in their relation to Great Britain exhibit one of the happiest instances of a constitutional anomaly which, while defying all rules of logic, is justified by its undisturbed historical existence. The least satisfactory part of the constitution of the Islands possesses for an historian the most interest. Courts which blend legislative and judicial powers are unlikely to be good tribunals, and a disciple of Montesquieu would find it hard to tolerate a confusion of powers which is dear to the Channel Islanders. But this very confusion of powers recalls that characteristic of the French 'Parliaments' which, in part at least, aroused Montesquieu's demand for the separation of legislative from judicial functions. Even in Jersey or Guernsey practical reformers may sooner or later destroy an interesting but inconvenient historical survival. Any one who reads Anson's work will be able to master in outline the peculiar constitutionalism of the Channel Islands as it now exists. If his book stimulates any youthful enthusiast for research to draw a more complete and elaborate picture of the last existing example of an antiquated form of constitution, it will render a real service to historians as well as to lawyers.

Russell on Crimes and Misdemeanours. Sixth Edition. By Horace Smith and A. P. Perceval Keep. London: Stevens & Sons, Lim., and Sweet & Maxwell, Lim. 1896. La. 8vo. Vol. I, lxxiv and 1045 pp.; Vol. II, lii and 1040 pp.; Vol. III, lxi and 844 pp. (£5 15*s.* 6*d.*)

Russell on Crimes and Misdemeanours is one of those monumental works well known to the English lawyer, whose bulk is so vast that their process of regeneration is naturally slow. Thus though the work has now occupied a prominent position for nearly a century the present edition is only the sixth, more than a fifth of a century has elapsed since the appearance of its predecessor, and counting the two present editors as one, six editions have engaged the attention of four editors. The merits of the original work consist in the fact that it is a collection of authorities, which though they are not very recondite, the practising barrister cannot always put his hand upon in a hurry. The editors have therefore acted wisely in not attempting to carry out any radical alteration in its design and scope; but, on the other hand, they do not seem to have acted on any consistent principle in the addition of new matter, and we cannot always command their excision of the old. *R.* v. *Ashwell* is no doubt a very important case from some points of view; but to devote sixteen pages to reprinting four of the chief judgments copied verbatim from the Law Reports is not a very intelligent or convenient way of dealing with it. On the other hand, the decision of *R.* v. *Collins*, as to attempts to commit crime, has given rise to a good deal of discussion and to other decisions, which, as has before now been pointed out in our columns, are open to certain well-founded objections: all of which is duly noticed in the present work, but merely in the briefest possible footnote. It may also be noted in the same connexion that several miles of print intervene between the record of *R.* v. *Collins* and that of *R.* v. *Duckworth*, with which it is closely connected. As to excisions, we cannot but regret that the editors have devoted as much space as they have, or indeed any space at all, to decisions on repealed statutes; they are either applicable to re-enacted statutes or wholly irrelevant, generally the latter, but by being classed together in separate chapters are necessarily out of place. It may be an inevitable drawback to the book that its contents have to be investigated by means of three Tables to Statutes, Tables to Cases and Indexes; but surely it ought to be possible in so large a work to find references to all the reports of any modern case; yet in the present work it continually happens that only one report is referred to and that by no means the best. In examining the new work more in detail, some errors are naturally discovered; so some of the indictable offences under the Merchant Shipping Act pass unnoticed; we are not told on p. 754 that 42 & 43 Vict. c. 18 (the Race Courses Licensing Act, 1879) applies only to the neighbourhood of the Metropolis, and no mention is made of 53 & 54 Vict. c. 37 (the Foreign Jurisdiction Act, 1890). These however are not very serious matters, and while the old work is as valuable as ever it was, the new, as far as we have been able to test the work of twenty years, is at least accurate and painstaking.

A Digest of the Law of Libel and Slander. By W. Blake Odgers, Q.C. Third Edition. London: Stevens & Sons, Lim. 1896. La. 8vo. lxxxvi and 841 pp. (32*s.*)

Even beginners in the Common Law scarcely need to be told that 'Odgers on Libel and Slander' has for several years been the standard work of

reference on the subject. In this third edition the author has found it needful, in consequence partly of recent decisions and partly of legislation, 'to rewrite the chapters on Trade Libel, Privilege, Malice, Injunctions, and Costs, as well as the portions of the book relating to Fair Comment, Imputations of Unchastity, Reports of Public Meetings, and Contempt of Court.' It is superfluous, for any one who knows Mr. Blake Odgers's diligence and accuracy, to say that the revision has been thoroughly done. We mention as a test case the treatment of the recent decision of the Court of Appeal in *Nevill* v. *Fine Arts, &c. Co.*, '95, 2 Q. B. 156, which has been noticed in no less than twelve places according to the various points it deals with.

The learned reader will find profitable criticism on both decisions and legislation. On *Pullman* v. *Hill*, '91, 1 Q. B. 524, it is pointed out, at p. 174, that dictating to a shorthand clerk words which do not exist in writing save as the clerk takes them down may be a slander, but cannot be the publication of a libel to the clerk; also that press-copying is not like a compositor's work in respect of publication to the person employed, inasmuch as in the former case the operator need not read the document he puts through the press, whereas a compositor must read his copy. The MS. of Louis Napoleon's proclamation of the *Coup d'État* is said to have been broken up into fragments which were separately unintelligible, to prevent any one in the Government printing-office from disclosing the plot. It would seem that in such an exceptional case—as well as where the printers do not understand the language of the text they are printing—there is no 'publication.' Again, at p. 293, Mr. Blake Odgers discusses the ambiguously worded s. 3 of the Law of Libel Amendment Act, which seems either to give an excessive immunity to newspaper reports of judicial proceedings (which, however, was not in fact the intention of Parliament), or to be only an imperfect declaration of the common law. A detailed history of the Act is given in the Appendix. Attention may be called to the excursus on the law of blasphemy (pp. 472–490) as a good piece of historical and critical work, and of much more than technical interest.

The Practice and Forms in Winding Up Companies and Reconstruction. By His Honour Judge Emden. Fifth Edition by D. Stewart Smith, assisted by Henry Johnston. London: William Clowes & Sons, Lim. 1896. La. 8vo. lxxv and 806 pp. (28*s.*)

Although this book professes to be a new edition of Judge Emden's Winding Up Practice, the differences in arrangement and otherwise are so great that one is inclined to wonder why Messrs. Stewart Smith and Johnston did not start a new practice book on their own account and under their own names only. The fourth and earlier editions contained the practice in a number of chapters in which the statutes and rules applicable were more or less paraphrased, and these chapters were followed by a collection of forms and an appendix of statutes, rules, and orders. The editor of the new edition admits his responsibility for the change in arrangement, and perhaps nothing but experience in handling the book can show whether the new arrangement is better than the old one. Part I deals with 'matters common to all forms of winding up, whether by the Court or voluntary.' This part, by the way, commences with Chapter II. and ends with Chapter XIV, Chapter I. being 'preliminary' and coming before and outside Part I. So far the chapters are not in the form of sections and rules in numerical order with notes, adopted by Mr. Buckley,

Mr. Snow, and others; but Part II, relating to winding up by the Court, consists of the Winding Up Act and Rules, annotated—in fact, we recognize in it a new edition of the Annual Winding Up Practice which came out for two or three years under the editorship of Mr. Emden and Mr. Snow, but which, as a separate publication, is now defunct. Part III relates to voluntary winding up, with and without supervision; Part IV to reconstruction, amalgamation, and arrangements; Part V to alterations in memoranda of association and reduction of capital; and Part VI to debenture holders, receivers, and managers. Appendix I contains 271 forms, and Appendix II consists of a number of statutes from 1862 to 1893, not annotated, and the general order of 1862 and 1868. Judge Emden is not responsible for the novelty of arrangement, and the book contains several statements which possibly would not be endorsed by a quondam Registrar in Companies Winding Up. One of these is as follows: 'The Companies Winding Up Act, 1890, and the rules made under it form *a complete code*, which now regulates the winding up of companies by the Court, when the registered office of the company is in England or Wales.' If this were correct, Appendix II might have been shortened by omitting ss. 74 to 169 of the Companies Act, 1862, which with a few exceptions are still unrepealed, and comprise in substance that part of the Act of 1862 which related, and still relates, to the 'Winding Up of Companies and Associations under this Act.' The table of cases refers to all the current series of reports, and the printing and general 'get-up' of the book are excellent.

The Principles of Equity and Equity Practice of the County Court. By Andrew Thomson. London: W. Clowes & Sons, Lim. 1896. 8vo. cxxxiv and 1015 pp. (32*s.* 6*d.*)

As originally intended, this book was to have the limited object of providing a kind of ready guide to County Court judges, registrars, and practitioners in County Courts in the conduct of cases on the equity side of those Courts. When, however, the work had been nearly done, and, as the author states, as an 'afterthought,' he appears to have extended his plan so as to make it also a handbook of principle and practice concerning the Chancery Division of the High Court. This extension, which is stated to have been made since the beginning of the present year, is not so obvious as the author presumes, for those portions of the book which deal with the practice in most places describe proceedings in the County Court and not in the High Court. But this, for several reasons, is but a small blemish. In the first place, the paucity of equity actions in the County Courts—a fact noted and lamented in the preface—renders it necessary in every case to consult and cite decisions on points of practice by the Chancery judges, and consequently Dr. Thomson was forced long before the extension of his plan to refer to those decisions while describing the course of proceedings in the County Court. In the next place, the jurisdiction of the superior Court, subject to the limit of amount, being almost identical with that of the High Court, the principles of equity expounded by Dr. Thomson were necessarily those which guide the superior tribunal. But taking the book as a general work on Equitable Jurisprudence and Practice, we think that it will be found useful to those who have not accustomed themselves to consulting their Seton or their Daniell, or even their plethoric White Book. Dr. Thomson's volume is a thick one—over 1,000 pages long; in it he has traced an action from start to finish, including forms of pleadings

and orders, and he has treated of administration, trusts, partition, mortgages, specific performance, the rectification and cancellation of documents, fraud, partnership, the appointment of new trustees, infants, married women. His statements of law are usually accurate and clear, and it is not his fault that the immense variety of the subjects he has handled, and the mass of judicial decisions in relation to them, have made it impossible to do full justice to each, even in the rather extended space he has allowed himself. Yet in practice it is often of much advantage to possess a book in which an outline only relating to the matter in hand is to be found, and this work will probably be often used for that purpose.

Dr. Thomson in his preface gives it as his opinion that a County Court dealing only with equity cases within the limit of £50 should be established in London, with the object of encouraging an increase in equity County Court work. It is not very clear how this result, even if otherwise desirable, would be attained by such means. It would seem that few equity matters come before the County Courts because the estates of deceased persons dealt with by administration, and the property involved in trusts and in other cases on the equity side of the Courts, are usually of greater value than the statutory limit. The increase of the amount which the County Courts might be permitted to adjudicate upon would of course augment the number of their Chancery cases, but it may be doubted whether this course would save either time or expense.

The Grand Jury in Criminal Cases, the Coroner's Jury, and the Petty Jury in Ireland. By WILLIAM G. HUBAND. Dublin: Edward Ponsonby. London: Stevens & Sons, Lim. 1896. La. 8vo. xxxi and 1176 pp.

THE author of this impressive work tells us in the forefront of his preface that he made a written abstract of every case he has cited and many more besides, that he placed abstracts of all the decisions on similar cases in juxtaposition, abridged the whole, and, we conclude, now considers it fit for serving up. This method of preparation is a time-honoured one, and Mr. Huband's industry and accuracy have enabled him to make the most of it; the more so as he has treated statutes and original authorities quite as fully as he has cases. The consequence is that he presents his readers with an enormous mass of valuable information relating to his subject, and his book is worthy of taking its place among the usual works of reference. We find no mention of sheriff's juries, otherwise the work seems complete. The errors we have detected are not worth mentioning, except that in referring to *Ashford* v. *Thornton*, 1819, 1 B. & Ald. 405, 19 R. R. 349, the author says that the latter was indicted after his wager of battle, whereby he shows that he completely misunderstands both the case as reported and the effect of 3 Hen. VII, c. 1. Thornton had already been acquitted on an indictment. After being discharged on Ashford's appeal he was arraigned on the appeal at the suit of the King, and discharged on the plea of *autrefois acquit*, as correctly stated in Stephen, Hist. Cr. L., i. 250. One defect, however, Mr. Huband shares with most of his illustrious predecessors in this monumental form of literature. His learning, though complete and well ordered, is quite undigested. We doubt whether Mr. Huband sees anything but superstition, cruelty, and force in ordeals, appeals, and wager of battle; he certainly fails to explain these matters in the least to an ignorant reader; nor is he any happier in his statement of the evolution of the petty jury or his explanation of their original functions.

The requisite information is all there, but lacks any intelligible comment. In the same way disquisitions on local venues, challenges, and other obsolete branches of knowledge are hopelessly mixed up with important decisions on modern law, without any distinction being made between the two. The author in fact cannot keep his archaeology and his law apart, and treats an obiter dictum in 13 Car. II with as much respect as he pays to the answers of the judges to the House of Lords anent Fox's Libel Act. At the same time the work contains much to interest both the practical lawyer and the man of learning, and the difficulty of finding it is reduced to a minimum by excellent arrangement and a careful index.

La Législation Pénale Comparée. Publiée par l'Union Internationale de Droit Pénal. Premier volume: Le Droit Criminel des États Européens. Berlin: Otto Liebmann. Paris: Pedone-Lauriel. Rome: Loescher & Cie. Lisbon: Ferin & Cie. 1894. 8vo. xxvi and 706 pp. (43·75 francs or 35 marks; or, for subscribers to the complete work, 37·50 francs or 30 marks).

The Union Internationale de Droit Pénal was founded in 1889. In 1890 it met at Bern and decided to undertake a comparative exposition of the different criminal laws which are at present in force in Europe. The enterprise was subsequently extended so as to include all the criminal laws of the world. Of this work only the first volume, which includes the criminal law of Europe, is now before us, but it is not unlikely that one or more of the subsequent portions have already been published.

The work is published in German and French simultaneously. Its plan includes, as we learn from the introduction, which is by Dr. Franz von Liszt of Halle, besides the series of separate monographs on the criminal laws of different countries which form the raw material, a general and a special part. The former is to contain three sections, dealing respectively with the sources of criminal law, the general theory of crime, and the theory of punishment. The latter will treat of particular crimes and the penalties attached to them. The present volume is composed of twelve treatises by various writers, which deal with the different European systems of law, beginning with that of France and ending with our own. They occupy, on an average, about sixty pages each.

It seems to have been considered by some members of the Union that no notice need be taken of the law of such countries as have no penal code, but it was finally apparent that no exposition would be sufficient which did not take account of the Common Law. Whether the superior 'knowability' of the law in countries where it is contained in a code renders it possible to give a fair account of the French criminal law in twenty-five pages, or of the various German systems in 108, is a question which must be left to those who have a practical knowledge of the working of the criminal law in the countries where they are in force. But any one who knows how difficult it is even for an Englishman to obtain a knowledge of our criminal law with only the assistance of the 400 or so pages of Sir James Stephen's Digest, will not fail to see that the attempt to explain our law and procedure to foreigners (as well as the not inconsiderable variations from it which are in force in Scotland) in seventy-five pages of a foreign language was not likely to be successful. It is therefore no discredit to Dr. Schuster, who has undertaken the task, to say that it is difficult to recognize our criminal law in the form in which it appears in this volume.

For example, there is no mention of the peculiarity of our procedure before trial, which consists in its publicity; and the French word 'instruction,' which is used to denote the preliminary stages both in England and in France, tends to obscure their essentially distinct character. No mention is made of the grand jury or its functions. The explanation of the peculiar difficulties which surround the questions of insanity, of homicide, and of larceny is insufficient. There is no account of the jurisdiction of the courts in extradition cases, or of the various forms of appeal in criminal cases.

Any one who uses the book for purposes of study in comparative criminal law should be careful to refer to original English sources as well.

A Treatise on the Law of Easements. By J. L. Goddard. Fifth Edition. London: Stevens & Sons, Lim. 1896. 8vo. xxxix and 605 pp. (25*s.*)

When the fourth edition appeared, now five years ago, we thought the merits of this book already too well established to need much commendation. The same reason obviously applies with greater force to the fifth edition. One new question considered by Mr. Goddard is whether the Court can award damages instead of an injunction for a prospective injury (p. 442). He thinks not, and we are of the same opinion. It would be a strong thing to hold that Lord Cairns's Act was intended to empower or did empower any Court to award damages in a case where an action for damages could not have been brought in a court of Common Law: to hold that a right of action to recover prospective damage is known to the common law would be still stronger.

On the Interpretation of Statutes. By the late Sir P. B. Maxwell. Third Edition, by A. B. Kempe. London: Sweet & Maxwell, Lim. 1896. 8vo. clvi and 630 pp. (21*s.*)

'Maxwell on Statutes' was at once accepted as supplying a real want, and supplying it very well, when it made its first appearance twenty-one years ago. This edition is unfortunately posthumous, but Mr. Kempe has had the use of the author's latest notes, and his work has every appearance of being thoroughly and judiciously done. The table of cases gives references to all the reports.

We have also received:—

A Selection of Cases on the English Law of Contract. By G. B. Finch. Second Edition, by R. T. Wright and W. W. Buckland. Cambridge: at the University Press. 1896. La. 8vo. xii and 867 pp. (28*s.*)—The second edition of 'Finch's Cases on Contract' contains a good many new cases, but the editors have contrived to save an equivalent amount of space. For example, *Bowen* v. *Hall*, which does not properly belong to the law of contract, has disappeared. We have our doubts whether students will not be perplexed by the inclusion of *Derry* v. *Peek* and *Ward* v. *Hobbs*—which also are not cases of contract—without some kind of explanation. Short head-lines are now given, we presume as a compromise with the suppressed head-notes, for the benefit of those who work with the book apart from any course of lectures. We are glad to think that Mr. Finch's endeavour to

foster the study of English law at first hand in the decisions themselves has been fruitful.

The Duties and Liabilities of Trustees. By AUGUSTINE BIRRELL, Q.C., M.P. London: Macmillan & Co., Lim. 1896. 12mo. x and 183 pp.—This is a clear and profitable exposition, and moreover readable beyond the common habit of law-books. It is addressed to trustees and persons likely to become trustees rather than to lawyers as such, but lawyers who happen to be trustees, as a good proportion of them do, might do much worse than keep Mr. Birrell's book by them and consult it when in doubt. Not all lawyers are equity lawyers, and even among equity lawyers only those who are in constant practice can make sure offhand either of knowing the law that is in force or forgetting the law that is obsolete. Mr. Birrell dares to be quite elementary, and that is one of his chief merits. We extract one sentence as a sample: 'An enormous number of breaches of trust are occasioned either by ignorance or by forgetfulness of the actual contents of the documents creating the trust.' This we believe to be one of the truths that are often overlooked just because they are plain and obvious.

The Criminal Law of India. By JOHN D. MAYNE. Madras: Higginbotham & Co. London: W. Clowes & Sons, Lim. 1896. 8vo. xxxix and 1028 pp.—Time allows us only to say at present that this is much the fullest and most authoritative commentary on the Indian Penal Code yet published. We may call attention to the chapter on jurisdiction and extradition, which contains some interesting special information on the position of Europeans and servants of the Government of India in native States.

English Statute Law revised. Being an analysis of the effect of the legislation of 1895 *upon earlier Statutes relating to England.* By PAUL STRICKLAND. London: W. Clowes & Sons, Lim. 1896. 8vo. 50 pp. (*2s. 6d.*)—The object of this useful little book is to show the effect of the legislation of 1895 on the English Public Statutes of previous years. The Table showing the effect of the year's legislation appended to the Statutes published with the Law Reports is extremely meagre. Mr. Strickland's book, on the other hand, gives very complete information as to the changes made during the year in the statute law. We hope that Mr. Strickland's venture will obtain so much success as will induce him to repeat it yearly.

The Statutory Trust Investment Guide. By R. MARRACK. Particulars as to investments by F. C. Mathieson & Sons. Second Edition. London: Effingham Wilson. 1896. 12mo. xv and 330 pp. (*6s.* net).—This little book contains a good deal of useful information for trustees. The present edition incorporates the text of the Trustee Acts 1893 and 1894 and the appropriate sections of the Indian Trusts Act, 1882. The particulars as to eligible investments are comprehensive and apparently trustworthy.

Death Duty Tables. By A. W. NORMAN. London: W. Clowes & Sons, Lim. 1896. La. 8vo. 343 pp. (*25s.* net).—This book is a wonderful compilation of figures. It contains Tables for valuing Successions and Annuities under the Succession Duty Act, 1853; the Scale of Estate Duty under the Finance Act, 1894, and of the Succession and Legacy duties, from the minimum of 1 to the maximum of 11½ per cent. Several examples of the application of the tables are given at the end of the book.

A Short History of Solicitors. By E. B. V. Christian. London: Reeves & Turner. 1896. 12mo. xiv and 255 pp.—Mr. Christian has gone to the right sources for his history both ancient and modern, and set it forth in a form both scholarly and readable.

The Law of Nature and Nations in Scotland. By W. G. Miller. Edinburgh: W. Green & Sons. 1896. 8vo. xvi and 141 pp.—Mr. Miller thinks it a strange oversight that the Society of Comparative Legislation does not take any special notice of Scotland. We believe the Society, as at present advised, is of opinion that Scotland has not a separate Legislature. It does not deal with legal history in general. For the rest, Mr. Miller has put together some interesting local information.

A Digest of Civil Law for the Punjab. By Sir W. H. Rattigan. Fifth Edition. London: Wildy & Sons. Lahore: Civil & Military Gazette. 1896. 8vo. xxxii and 275 pp.

A Guide to Criminal Law, intended for the use of students for the Bar Final and for the Solicitors' Final Examinations. By Charles Thwaites. Fourth Edition. London: G. Barber. 1896. 8vo. 138 pp. (7*s.* 6*d.*)

The Law and Practice relating to County Court Appeals. By Daniel Chamier. London: Stevens & Sons, Lim., and Sweet & Maxwell, Lim. 1896. 8vo. xv and 125 pp. (10*s.*)

A Digest of the Law of Bills of Exchange. By His Honour Judge Chalmers. Fifth Edition. 1896. London: Stevens & Sons, Lim. 8vo. lviii and 434 pp. (18*s.*)

Hints as to advising on Title. By W. H. Gover. Third Edition. London: Sweet & Maxwell, Lim. 1896. 8vo. xli and 207 pp. (8*s.*)

Ruling Cases. Edited by Robert Campbell. With American Notes by Irving Browne. Vol. VII. Conversion—Counsel. London: Stevens & Sons, Lim. Boston, Mass.: Boston Book Co. 1896. La. 8vo. xxv and 731 pp. (25*s.*)

The Revised Reports. Edited by Sir F. Pollock, assisted by R. Campbell and O. A. Saunders. Vol. XXIV. 1821–1824 (Turner & Russell; 1 Simons & Stuart; 5 Barnewall & Alderson; 1 Dowling & Ryland; 3 Broderip & Bingham; 7 & 8 Moore; 10 Price). London: Sweet & Maxwell, Lim. Boston, Mass.: Little, Brown & Co. 1896. La. 8vo. xv and 799 pp. (25*s.*)

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.
